87-1911

No. ——

Supreme Court, U.S.
FILED
MAY 23 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Petitioners,

v.

GUILFORD TRANSPORTATION INDUSTRIES, INC., *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Date: May 23, 1988

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QUESTIONS PRESENTED *

1. Do the United States District Courts have jurisdiction under 28 U.S.C. § 1337(a) to enforce the commands of the Railway Labor Act, even though the rail carrier, which is claimed to have violated the Railway Labor Act, is participating in a transaction subject to regulation by the Interstate Commerce Commission under 49 U.S.C. § 11343(a)?

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* The parties to the proceeding below are:

Appellants below and petitioners here:

Railway Labor Executives' Association;
American Railway & Airway Supervisors Association (Division of TCU);
American Train Dispatchers Association;
Brotherhood of Locomotive Engineers;
Brotherhood of Maintenance of Way Employes;
Brotherhood of Railroad Signalmen;
Brotherhood of Railway Carmen (Division of TCU);
International Association of Machinists and Aerospace Workers;
International Brotherhood of Boilermarkers and Blacksmiths;
International Brotherhood of Electrical Workers;
International Brotherhood of Firemen & Oilers;
Railroad Yardmasters of America (Division of UTU);
Sheet Metal Workers' International Association;
Transportation • Communications Union (formerly BRAC);
United Transportation Union, and
International Federation of Professional and Technical Engineers.

Appellees below and respondents here:

Guilford Transportation Industries, Inc.;
Boston and Maine Corporation;
Delaware & Hudson Railway Company;
Maine Central Railroad Company;
Portland Terminal Company; and
Springfield Terminal Railway Company.

2. Does 49 U.S.C. § 11341(a) and its immunity from prohibitory or restraining federal laws apply to a rail carrier participating in a transaction within the scope of 49 U.S.C. § 11343(a) when that transaction has been exempted from regulation by an order of the Interstate Commerce Commission issued under 49 U.S.C. § 10505?

3. Does the ICC's jurisdiction over financial transactions concerning railroads relieve the rail carriers, participating in such transactions, of their obligations under the Railway Labor Act or under their collective bargaining agreements where compliance with those obligations would interfere with the carriers carrying out the transaction in the manner proposed in their pleadings filed with the Commission?

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioners Railway Labor Executives' Association [hereinafter, "RLEA"] [1] and fifteen (15) individual labor organizations [2] respectfully request that this Court issue a writ of certiorari to the United States Court of Appeals for the First Circuit to review the judgment of that court in *RLEA v. Guilford Transportation Industries, Inc.*, 1st Cir No. 87-1774, decided January 20, 1988.

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[1] RLEA is an unincorporated association of the chief executive officers of nineteen labor organizations which collectively represent virtually all organized rail employees in this country. A list of RLEA's member organizations is reproduced as Appendix F at page 53a. All of the individual petitioning labor organizations, except for the International Federation of Professional and Technical Engineers, are member organizations of RLEA.

[2] The individual petitioning labor organizations are listed at page i, note *.

OPINIONS BELOW

The *per curiam* decision of the First Circuit is not reported; it is reproduced as Appendix A to this Petition at pages 1a-2a. The judgment of the appellate court is reproduced herein as Appendix D at page 44a. The decision of the United States District Court for the District of Maine which was affirmed by the First Circuit is reported at 667 F. Supp. 29 and is reproduced herein as Appendix B at pages 3a-16a.

JURISDICTION

On January 20, 1988, the United States Court of Appeals for the First Circuit issued a *per curiam*, unpublished decision affirming the judgment of the United States District Court for the District of Maine dismissing petitioners' complaint to enforce the Railway Labor Act, 45 U.S.C. § 151, *et seq.* Petitioners are seeking to invoke this Court's jurisdiction under 28 U.S.C. § 1254(1) to review that judgment. This petition is timely since it is being filed within the time period provided by 28 U.S.C. § 2101(c); the initial 90 day period provided by Section 2101(c) ran to April 19, 1988, but on April 12, Justice Brennan granted petitioners a thirty-day extension to and including May 19, 1988 in which to file this petition, and on May 19, granted petitioners a further extension of seven (7) days. Sup. Ct. No. A-785, *RLEA v. Guilford Transportation Industries, Inc.*

STATUTES INVOLVED

This case involves the relationship between two Acts of Congress which regulate aspects of interstate commerce —*i.e.*, the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, and the Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.* In particular, this case involves the impact of Sections 10505 and 11347 of the Interstate Commerce Act, 49 U.S.C. §§ 10505 and 11347, on the obligations imposed upon carriers by Sections 2 First, 2 Seventh, 5 First, and 6 of the Railway Labor Act, 45 U.S.C. §§ 152 First,

152 Seventh, 155 First and 156, and on the federal courts' jurisdiction to enforce those duties. Section 7 First of the Railway Labor Act, 45 U.S.C. § 157 First, Sections 11341(a) and 11343(a) of the Interstate Commerce Act, 49 U.S.C. §§ 11341(a) and 11343(a), and Section 405(b), of the Rail Passenger Service Act, 45 U.S.C. § 565(b), along with 28 U.S.C. § 1337(a), are also relevant to this case. The relevant statutes are reproduced as Appendix E at pages 45a-52a.

STATEMENT OF THE CASE

Respondents are a holding company, Guilford Transportation Industries, Inc. [hereinafter, "GTI" or "Guilford"], four of its rail subsidiaries which are leasing their rail lines,[3] and the GTI subsidiary which is leasing those lines, the Springfield Terminal Railway Company [hereinafter, "ST"]. Formed in the early 1980's to operate a rail system in the Northeast region of this country, primarily in the New England area, the Guilford rail system included almost 4,000 miles of rail lines in early 1986, employing approximately 4,000 employees. *See, GTI—Control—D&H*, 366 I.C.C. 396, 397 (1982). In 1986, one of the petitioners, the Brotherhood of Maintenance of Way Employes [hereinafter, "BMWE"], conducted a work stoppage against respondents MEC and PT, and within a few weeks, that strike resulted in approximately 98% of the Guilford rail system's employees withholding their labor from Guilford. *See, RLEA v. B&M*, 808 F.2d 150, 153 (1st Cir. 1986), *cert. denied*, 98 L. Ed.2d 62 (1987). Several issues arising from that strike eventually wound up being resolved by this Court (*Burlington Northern R.R. v. BMWE*, 481 U.S. ——, 95 L. Ed.2d 381 (1987)) and by Congress. *E.g.*, Pub. L. No. 99-431, 100 Stat. 987 (1987).

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[3] The leasing railroads are Boston and Maine Corporation, Delaware & Hudson Railway, Maine Central Railroad, and Portland Terminal Company [hereinafter, "B&M," "D&H," "MEC," and "PT," respectively].

That strike and Guilford's efforts to continue its operations despite the withdrawal from service by most of its contract employees, led Guilford to take steps beginning in May 1986 to eliminate both the collective bargaining agreements between its main subsidiaries (*i.e.*, the B&M, D&H, MEC and PT) and rail labor, and the craft line restrictions on the utilization of employees. *RLEA v. B&M*, 664 F.Supp. 605 (D. Me. 1987). Guilford first tried to use the collective bargaining process and the ten (10) day "loop-hole" in Section 6 of the Railway Labor Act, 45 U.S.C. § 156,[4] to promulgate its craftless employment terms, but those efforts were stopped when the unions invoked the mediatory jurisdiction of the National Mediation Board [hereinafter, "NMB"] under Section 5 First of the Railway Labor Act, 45 U.S.C. § 155 First. *RLEA v. B&M*, *supra*, 664 F.Supp. at 609-11.

A. Guilford's Leases

Once its efforts to eliminate its existing collective bargaining agreements in a short time frame were stymied, Guilford began to lease various portions of its subsidiaries' rail operations to another one of its subsidiaries, respondent ST. Under those leases, the lessors leased specific portions of their lines and facilities to the ST for the ST to provide the lessors' rail services. However, those agreements provided that:

> All traffic which originates or terminates on the Leased Lines shall remain [the lessor's] . . . traffic, whether such traffic involves customers presently located on or served by the Leased Lines or customers which become located on or served by the Leased Lines at any time during the term of this Lease

[4] Section 6 of the Railway Labor Act requires the parties to a major dispute to preserve the status quo "unless a period of ten days has elapsed after termination of conferences, without request for or proffer of the services of the Mediation Board." 45 U.S.C. § 156; *see, Iberia Air Lines v. NMB*, 472 F.Supp. 104 (S.D.N.Y. 1979), *aff'd* 636 F.2d 1201 (2d Cir. 1980), *cert. denied*, 450 U.S. 999 (1981).

> Agreement. ST shall handle cars on the Leased Lines for the account of [the lessor] . . . , and [the lessor] . . . shall be responsible for car hire and mileage payments in respect of such cars. [Lessor] . . . shall have and retain the exclusive right to deal directly with customers regarding traffic moving to or from the Leased Lines and to solicit such traffic in its best interest.

Lease Agreement at § 2.03, Joint Appendix in 1st Cir. No. 87-1774 [hereinafter, "J.A."] at 47. Respondent ST was also made responsible for maintaining the tracks. *Id.* at § 3.01; J.A. at 48. In exchange for performing those services, respondent ST is to be paid a set fee, generally $150.00, for each loaded car it moves for the lessor; ST, however, does not pay any rent to the lessor. *Id.* at § 2.06; J.A. at 48. In short, the lease agreements gave the ST the right to perform the labor for the lessors which the lessors had previously agreed their contract employees should perform.

Guilford began to enter into the ST lease arrangements in October 1986, and by the end of 1987 had entered into seventeen (17) different leases and one operating agreement, which collectively will transfer all of the B&M, D&H, and MEC operations and most of the PT's operations to the ST. ICC Finance Docket No. 30965, *et al.*, *D&H—Lease and Trackage Rights Exemption—ST*, served February 19, 1988 (a copy of the corrected decision is attached as Appendix C at pages 17a-43a). As Guilford informed the Interstate Commerce Commission [hereinafter, "ICC" or "Commission"], its subsidiaries entered into those leases for the following reason:

> The purpose of the transaction is to enable ST to carry on the operations presently performed by [the lessor] . . . on these lines. ST is a short line carrier which has a lower cost structure than [the lessor] . . . and other Class I carriers. It is anticipated that the service which ST will provide to rail customers will be more responsive and efficient than [the lessor] . . . is providing at the present time. As a re-

> sult of the lease, [the lessor] . . . will improve its financial viability by eliminating operations which are costly to perform in relation to the revenues which are realized. With its lower cost structure, ST should be able to perform such operations on a profitable basis.

Verified Notice of Exemption in Finance Docket No. 30966 at 6; J.A. at 33. Respondent ST has a lower cost structure simply because prior to the GTI leases, it was a small carrier that employed few employees (around fifty (50) employees prior to January 1, 1987) and was a party to a collective bargaining agreement with one member of RLEA which provided for lower rates of pay and, according to GTI, did not contain craft line distinctions. Appendix C at 27a-28a.

Petitioners alleged in their Complaint in this case that the leases were "a systematic and deliberate plan [by respondents] to effect without bargaining the changes in rules and working conditions which they had proposed in May 1986" and which were pending before the NMB for mediation under Section 5 First of the Railway Labor Act. *E.g.*, Complaint at ¶ 13. Petitioners also alleged in their Complaint that the leases and respondents' use of the ICC processes were being utilized "for the purpose of eliminating various work rules and eliminating all craft line distinctions without first exhausting the major dispute resolution procedures of the Railway Labor Act." Complaint at ¶ 13. Petitioners further alleged that respondents hoped to achieve their purposes by relying upon the ICC's belief that its orders, including rail exemptions under 49 U.S.C. § 10505, relieved carriers of their obligations under the Railway Labor Act and under their collective bargaining agreements and, thus, enabled Guilford to transfer to the ST the right to perform the lessor carrier's labor under the ST's rates of pay, rules and working conditions without first bargaining with rail labor over those proposed changes to the lessor's existing employment terms. Complaint at ¶ 15-16.

To effectuate its lease arrangements, GTI exercised a class exemption which the ICC had granted under 49 U.S.C. § 10505 to all affiliated rail carriers from the prior approval requirements of 49 U.S.C. § 11343(a) for intracorporate family financial transactions "that do not result in adverse changes in service levels, signficant operational changes, or a change in the competitive balance with carriers outside the corporate family." 49 C.F.R. § 1180.2(d)(3), promulgated by *Ex Parte No. 282 (Sub-No. 3), Railroad Consolidation Procedures*, 363 I.C.C. 200 (1980). In order to exercise that blanket exemption, a rail carrier planning to participate in such an exempt transaction need only file with the Commission "a verified notice of the transaction . . . at least one week before the transaction is consummated . . . ." 49 C.F.R. 1180.4(g)(1). Within thirty (30) days of the filing of the verified notice, the Commission will publish a description of the exempt transaction in the Federal Register, but in the interim, the exemption is effective and the carriers may implement their transaction at any time more than seven (7) days after the notice is filed with the ICC. 49 C.F.R. § 1180.4(g)(1)(ii).[5]

Section 11347 of the Interstate Commerce Act, 49 U.S.C. § 11347, requires the ICC to condition all approvals of Section 11343 rail transactions by imposing a fair arrangement to protect the interests of rail employees who may be affected by the implementation of the approved transaction. In this case, however, the leases were not "approved" by the ICC, for the class exemption which Guilford exercised exempted the lease transactions from the prior approval requirements of Section 11343.[6]

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[5] This seven day time frame is modified by the advance notice required by the employee protective conditions which Sections 10505(g)(2) and 11347 require be imposed.

[6] Respondents assert that an exemption is an "approval;" this dispute is relevant here because Section 11341(a)'s immunity applies to "approvals" under Section 11344, but, petitioners submit, not to rail exemptions. *See* pages 21-23, *infra*.

Nevertheless, Section 10505(g)(2) of the Interstate Commerce Act prohibits the ICC from exempting a rail carrier from "its obligation to protect the interests of employees as required by" the Interstate Commerce Act. 49 U.S.C. § 10505(g)(2).

In this case, however, a question arose when Guilford began to lease MEC and D&H operations to the ST as to the appropriate level of employee protections to be imposed as required by Section 11347. Guilford asserted that the appropriate levels of protection were those known as the *Mendocino Coast* conditions which were normally imposed in lease cases.[7] Rail labor, however, asserted that because of the relationship of the leases to the earlier control cases and because of the circumstances of this case, the appropriate levels of protection were those provided by what are known as the *New York Dock* conditions.[8] As relevant here, the primary difference between the two sets of conditions lies in the "implementing agreement" requirements. According to the Commission, implementing agreements under the *Mendocino Coast* conditions do not involve both carriers, whereas *New York Dock* implementing agreements do. Appendix C at 21a-22a n.4. And second, under the *New York Dock* conditions, the carriers may not implement the transaction until after an implementing agreement or arbitrated arrangement is reached which provides the basis on which the forces to perform the affected work will be selected; the *Mendocino Coast* conditions allow the implementing arrangement to be devised *after* the transaction is effectuated. *Id.*

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[7] The *Mendocino Coast* conditions are those employee protections first promulgated in *Mendocino Coast Ry.—Lease and Operate*, 354 I.C.C. 732 (1978), *as modified*, 360 I.C.C. 653 (1980), *aff'd sub nom. RLEA v. United States*, 675 F.2d 1248 (D.C. Cir. 1982).

[8] The *New York Dock* conditions are those employee protections first promulgated in *New York Dock Ry.—Control*, 360 I.C.C. 60, *aff'd New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979).

Because of this dispute as to the appropriate levels of protection if the leases went forward, petitioner RLEA asked the ICC to stay the effectiveness of the exemptions until it decided what were the appropriate levels of protection required by Section 11347 in these lease proceedings. Initially, however, the ICC denied rail labor's requests, stating that it was taking RLEA's request for the *New York Dock* conditions under advisement and that in the interim, if the carriers consummated any lease, they did so at their "own risk," for "[s]hould the Commission subsequently determine that a higher level of protection is required, [the parties] . . . will be required to provide . . . employees with that greater protection." ICC Finance Docket No. 31015, served June 5, 1987 at 6; J.A. at 117.[9] In late October 1987, the ICC stayed implementation of the unconsummated leases until it resolved the employee protection issue. *See*, Appendix C at 23a-24a.

While the ICC was considering the appropriate level of protection for employees affected by the leases, Guilford consummated eleven (11) leases, transferring the entire MEC operations, and most of the B&M and PT operations to the ST. More than 2,000 employees were affected by those leases, and while most obtained jobs with the ST, employment with the ST was governed by

[9] On May 18, 1987, the ICC issued an order setting the question of the appropriate level of employee protection for a hearing on its modified procedure basis—*i.e.*, written submissions—and on February 19, 1988 it issued a decision concluding that modifications to the *Mendocino Coast* conditions implementing agreement requirements were needed, but that the *New York Dock* conditions were not needed. Appendix C. Rail labor, on December 8, 1987, had asked the ICC to revoke the exemptions because, rail labor asserted, there was no independent transportation purpose for the leases which would justify their impact on the employees' Railway Labor Act and contractual rights. Although the ICC denied rail labor's petitions to revoke, it did not address that argument, and on March 10, 1988, petitioners asked the ICC to reopen that decision; that petition is still pending.

entirely new rates of pay, rules and working conditions. Appendix C at 26a-28a.[10] However, hundreds of the lessors' employees did not take a job with the ST, and on November 12, 1987, the ST employees struck that carrier over what the employees claimed were unsafe working conditions. That strike is still in progress, although the parties are currently arbitrating whether Guilford improperly refused the employees' offer to return to service.

B. Petitioners' Efforts To Enforce The Railway Labor Act

On January 28, 1987, petitioners filed a two count complaint with the United States District Court for the District of Maine, the first count to enforce the *New York Dock* conditions which were imposed as a condition of the 1982 control authorizations (*see, GTI—Control—D&H, supra*), and the second count to enforce the Railway Labor Act. On January 30, the district court tentatively dismissed the first count of the complaint[11] and respondents subsequently moved to dismiss the remaining count for lack of subject matter jurisdiction. After that issue was fully briefed, rail labor asked the district court to issue a preliminary injunction to enforce the Railway

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[10] The issue of what employment terms will govern ST operations is still not settled, for on February 19, 1988, when the ICC concluded that the *Mendocino Coast*'s implementing agreement provisions were not adequate in this case, it required all of the Guilford carriers to negotiate or arbitrate an implementing arrangement with rail labor which will provide a basis on which employees of the lessors will be able to follow their work to the ST. Appendix C. The parties are presently arbitrating that arrangement and one of the issues raised by GTI is whether the ST agreement should govern its operations.

[11] That tentative ruling was finalized on July 27, 1987, for the court concluded that petitioners' attempt to enforce the *New York Dock* conditions was within the primary jurisdiction of the ICC and that no justification existed to retain jurisdiction over the claim pending the ICC's determination of the claim. Appendix B at 11a-13a. Petitioners did not challenge that ruling on appeal and are not asking this Court to review that ruling.

Labor Act by enjoining any further implementation of the leases and by requiring respondents to rescind the leases which they had previously implemented. On July 27, 1987, the district court issued its decision dismissing the complaint for lack of jurisdiction.

Relying upon *BLE v. B&M*, 788 F.2d 794 (1st Cir.), *cert. denied*, 107 S. Ct. 111 (1986), in which the First Circuit had reached a similar result, the district court concluded that Section 11341(a) of the Interstate Commerce Act, 49 U.S.C. § 11341(a), relieved respondents from all legal obstacles that would impede the transaction, such as respondents' obligations under the Railway Labor Act. According to the district court, "Congress has expressly provided, through its enactment of section 11341, that transactions deemed to be in the public interest by the ICC override the rights and duties created by Congress in the RLA." Appendix B at 15a. As the lower court explained (*Id.*):

> Although [petitioners] . . . lose whatever their rights would be under the RLA, [petitioners] . . . have not lost all for they have a remedy—and are in fact concurrently pursuing it—compensation for the loss of their RLA rights. This remedy is provided by the ICC. Therefore, the forum for raising these arguments is the forum provided by that agency.

After concluding that the complaint had to be dismissed, the district court indicated that it was not oblivious to what was happening, for the court stated (Appendix B at 16a):

> Over the course of this labor dispute, the parties have been repeatedly successful in invoking the jurisdiction of this Court to enforce the mandates of the RLA. [Respondents'] . . . goal in these proceedings has not been hidden; they have sought and continue to seek a streamlined work force and the implementation of their conception of a cost-efficient labor agreement. [Respondents'] . . . efforts, however, have been remarkably unsuccessful, due in part to their failure to reach a meaningful agreement with

> the unions involved and in part to the almost interminable procedures of the RLA, procedures which have been upheld by various decisions of this Court and which have been supplemented by various actions of both Congress and the President. Nevertheless, [respondents] . . . have now apparently discovered an alternate method to achieve a similar goal. Although the Court has examined the record presented in this case and has considered with care the arguments raised by [petitioners] . . . , the Court finds that [petitioners] . . . have presented their request for relief to the wrong forum. The relief they request is available only from the ICC and not from this Court. . . .

On August 3, 1987, petitioners noted an appeal from the district court's judgment dismissing their complaint, and subsequently suggested that the United States Court of Appeals for the First Circuit hear their appeal *en banc* because that appeal was controlled by *BLE v. B&M*, *supra*, which petitioners asserted was incorrectly decided. That suggestion was denied and on January 20, 1988, the appellate court entered its ruling affirming the judgment of the district court. Appendix A at 1a. According to the appellate panel, "[c]ontrary to [petitioner's] . . . argument, Justice Stevens' opinion in *ICC v. Brotherhood of Locomotive Engineers*, 107 S.Ct. 2360, 2370 (1987) (Stevens, J., concurring), casts no large shadow of doubt over our earlier decision in" *BLE v. B&M*, *supra*. Appendix A at 2a. Moreover, the panel concluded that: "Nor have any compelling reasons been advanced which make us believe that reconsideration of our recent precedent should be undertaken or recommended by this panel." *Id.*

REASONS FOR GRANTING THE WRIT

This Case Presents Important Issues Of Federal Law That Have Been Decided In A Manner Which Conflicts With Applicable Decisions Of This Court And Other Courts Of Appeals, And With The Intent Of Congress. Moreover, Those Issues Have Been Decided In A Manner That Needlessly Creates A Conflict Between Two Acts Of Congress Which Regulate The Rail Industry

I. This Case Presents Issues That Are Important To The Rail Industry And Need To Be Resolved Expeditiously By This Court

Under the statutory scheme that Congress has adopted to regulate labor relations in the rail industry, a railroad may not "change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6" of the Railway Labor Act. 45 U.S.C. § 152 Seventh. Section 6 of the Act, 45 U.S.C. § 156, in turn requires thirty (30) days advance written notice of the proposed change, and together with Sections 2 First and 5 First of the Act, 45 U.S.C. §§ 152 First, 155 First, requires the carrier both to exert every reasonable effort to reach an agreement on its proposed change and to preserve the status quo pending full compliance with its bargaining obligations under the labor statute. *Detroit & Toledo Shore Line R.R. v. UTU*, 396 U.S. 142 (1969).

Applied to this case, the Railway Labor Act required the Guilford carriers to give the notice mandated by Section 6 of their intent to lease their operations to the ST and to make every reasonable effort to negotiate an agreement with rail labor about that plan and its impact on employees. Moreover, the labor statute prohibited respondents from changing the status quo by transferring their operations to the ST until they had complied fully with the Act's bargaining obligations. *E.g.*, *Chicago & North Western Ry. v. UTU*, 402 U.S. 570 (1971); *ALPA*

v. Transamerica Airlines, Inc., 817 F.2d 510 (9th Cir. 1987), *cert. denied*, 108 S.Ct. 451 (1988); *St. Louis Southwestern Ry. v. BRS*, 665 F.2d 987 (10th Cir. 1981); *United Industrial Workers v. Board of Trustees of Galveston Wharves*, 351 F.2d 183 (5th Cir. 1965). Guilford did not comply with that statute because it asserted that its obligations under the labor statute were "preempted" by the Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.*

Railroads are subject to regulation under the Interstate Commerce Act which, as relevant to this case, prohibits a rail carrier from leasing its operations to another railroad without first obtaining the approval of the ICC. 49 U.S.C. § 11343(a)(2). Moreover, the ICC may not approve such a lease transaction unless the carriers agree to provide a fair arrangement to protect the interests of all rail employees who may be affected by the lease. 49 U.S.C. § 11347. Also, as relevant here, for the past twelve (12) years the ICC has been given the power to exempt a rail carrier from the prior approval requirements of the Interstate Commerce Act if the Commission concludes that regulation under that Act "is not necessary to carry out the transportation policy" of 49 U.S.C. § 10101a and that the transaction at issue is of limited scope. 49 U.S.C. § 10505(a). That power, however, may not be used "to relieve a carrier of its obligation to protect the interests of employees as required by this subtitle" including by 49 U.S.C. § 11347. 49 U.S.C. § 10505(g)(2).

For more than sixty (60) years, the Railway Labor Act and the Interstate Commerce Act have existed side-by-side, and not once during the first fifty-six (56) years of that co-existence did the courts or the ICC conclude that there was in fact an irreconcilable conflict between those two Acts of Congress. *Compare, Chicago, St. Paul, Minneapolis & Omaha Ry.—Lease*, 295 I.C.C. 696, 701-02 (1958), *with, Southern Ry.—Control*, 331 I.C.C. 151, 169-

71 (1967).[12] However, in 1983 the ICC, relying upon the immunity from conflicting laws conferred by 49 U.S.C. § 11341(a),[13] stated that its order in a merger case had the effect of relieving the railroads participating in that approved transaction from obligations imposed by the Railway Labor Act (*see*, ICC orders at issue in *ICC v. BLE*, 482 U.S. ——, 96 L. Ed.2d 222 (1987)), and since that time the railroads have been using ICC approval orders and exemption orders to rid themselves of collective bargaining obligations without first bargaining under the Railway Labor Act. *See, Arbitration Between BLE and Union Pacific R.R. and Missouri Pacific R.R.*, re ICC Finance Docket No. 30,000, decided January 17, 1985 (Seidenberg, Neutral) (a copy of that decision is reproduced herein as Appendix G at pages 54a-63a). Moreover, relying upon the collateral attack rule expressed in *Venner v. Michigan Central R.R.*, 271 U.S. 127, 130 (1926), and their belief that the ICC has been given exclusive jurisdiction over labor disputes arising

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[12] In several cases, the lower courts have stated that if there were such a conflict between the two statutes, the Interstate Commerce Act would prevail over the commands of the Railway Labor Act because of the express immunity granted by what is now Section 11341(a) of the Interstate Commerce Act, 49 U.S.C. § 11341(a), *e.g., Burlington Northern, Inc. v. ARSA*, 503 F.2d 58, 62-63 (7th Cir. 1974), *cert. denied*, 421 U.S. 975 (1975); in one case, *BLE v. Chicago & North Western Ry.*, 314 F.2d 424 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963), the appellate court held that Section 11341(a)'s predecessor superseded the Railway Labor Act, but noted that there was no conflict between the two Acts in that case. 314 F.2d at 433.

[13] 49 U.S.C. § 11341(a) provides in pertinent part, that:

> A carrier . . . participating in that approved or exempted transaction [*i.e.*, a "transaction approved by or exempted by the Commission under this subchapter"—Sections 11341 to 11351] is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction.

from ICC regulated transactions, the railroads and the ICC have argued, often successfully, that rail labor may not ask the federal courts to enforce the Railway Labor Act.

Even though the impact of ICC orders on rail employees' substantive and enforcement rights under both the Railway Labor Act and their collective bargaining agreements has been a frequent subject of litigation between rail labor and management during the past five years, that question is still in dispute. *Compare, BLE v. B&M*, 788 F.2d 794 (1st Cir.), *cert. denied*, 107 S.Ct. 111 (1986), *with, RLEA v. Pittsburgh & Lake Erie R.R.*, 3rd Cir. No. 87-3797, decided April 8, 1988, *pet. for cert. pending*. Sup. Ct. No. 87-1888. Indeed, it is not even settled today whether rail labor can invoke the aid of the federal courts to determine whether the Railway Labor Act is, or is not, superseded, for the lower courts are divided on whether such a suit is a collateral attack on the ICC's order authorizing or exempting the financial transactions. *Compare, BLE v. B&M, supra*, 788 F.2d at 801, *and UTU v. Burlington Northern R.R.*, 672 F. Supp. 1579 (D. Mont. 1987), *appeal pending*, 9th Cir. No. 87-4386, *with, RLEA v. Pittsburgh & Lake Erie R.R., supra.*

Petitioners respectfully submit that it is crucial to the stability of the rail industry today that this Court settle the current dispute over the relationship between the transportation and labor statutes. As may be expected, the abrogation of contractual and statutory rights has severely strained labor relations in the rail industry, and, when coupled with the lack of any meaningful forum to enforce existing rights, has forced rail labor to exercise its economic powers to enforce those rights. To date, there have been two strikes and the threat of five other strikes because of the carriers' belief that the Interstate Commerce Act relieves them of their Railway Labor Act and contractual obligations, and there is the possibility of yet another strike if the Burlington Northern Railroad

consummates an ICC exempted transfer of operations to a wholly-owned subsidiary. *See, Burlington Northern R.R. v. UTU*, N.D. ILL. Civil Action No. 88 C 2687. Because the underlying dispute between the parties is essentially a legal one, a negotiated resolution is difficult and, thus, any one of those strikes may lead to a nation-wide curtailment of rail service. *See, Burlington Northern R.R. v. BMWE*, 481 U.S. ——, 95 L. Ed.2d 381 (1987).

At present, there are cases pending before five circuit courts of appeals [14], at least four district courts,[15] and this Court [16] that raise some of the issues. However, none of those cases, except for this case, presents all three of the relevant issues which need to be resolved. Since the frequency of the carriers' use of the ICC's putative powers has increased in the past year, the rail industry does not have the time to see if the lower appellate courts can reconcile the widely divergent views on this issue. More important, however, such a reconciliation is unlikely because, when examined closely, the First Circuit's approach is contrary to the Interstate Commerce Act and to prior decisions by this Court.

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[14] *RLEA v. City of Galveston*, 5th Cir. No. 87-6169; *Chicago & North Western Transportation Co. v. RLEA*, 7th Cir. No. 88-1504; *Burlington Northern R.R. v. UTU*, 8th Cir. No. 87-2600WM; *RLEA v. Chicago & North Western Transportation Co.*, 8th Cir. No. 87-5071 MN; *UTU v. Burlington Northern R.R.*, 9th Cir. No. 87-4386; *Brotherhood of Railway Carmen v. CSX Transportation, Inc.*, 11th Cir. No. 87-8466.

[15] *CSX Transportation, Inc. v. UTU*, W.D.N.Y. Civil Action No. 87-1391C; *RLEA v. Soo Line R.R.*, N.D.Ill. Civil Action No. 87 C 5293; *Atchison, Topeka & Santa Fe Ry. v. RLEA*, N.D.Ill. Civil Action No. 87 C 9847; *Burlington Northern R.R. v. UTU*, N.D.Ill. Civil Action No. 88 C 2687; *Burlington Northern R.R. v. UTU*, W.D.Mo. Civil Action No. 86-5013-CV-SW-8; *BLE v. Burlington Northern R.R.*, E.D.Wa. Civil Action No. C-88-233-RJM.

[16] *Pittsburgh & Lake Erie R.R. v. RLEA*, Sup. Ct. No. 87-1888 (filed May 17, 1988); *Pittsburgh & Lake Erie R.R. v. RLEA*, Sup. Ct. No. 87-1589 (filed March 24, 1988).

In view of the extreme importance of these issues to the orderly administration of the Railway Labor Act and the Interstate Commerce Act, petitioners respectfully submit that this Court should conclude what it attempted to do two years ago when it granted certiorari in *ICC v. BLE* and determine whether there is in fact a conflict between the two Acts of Congress, and if so, which statute prevails.

II. The Decision Below Was Decided In A Way That Conflicts With Applicable Decisions Of This Court

In concluding that it lacks jurisdiction to consider petitioners' complaint to enforce the Railway Labor Act, the district court noted that the ICC was, pursuant to rail labor's request, considering the impact of the leases on the employees' collective bargaining rights. Appendix B at 15a. Since that inquiry was relevant to the levels of employee protection which the Commission would eventually impose, the lower courts reasoned, the ICC, and not the federal courts, had the exclusive jurisdiction to determine exactly how rail labor's rights will be protected in this case. *See, BLE v. B&M, supra*, 788 F.2d at 801. That approach to the relationship between the Interstate Commerce Act and the Railway Labor Act, petitioners submit, is contrary to prior decisions of this Court which have emphasized that the Commission does not have jurisdiction to enforce other laws and that the tribunal called upon to enforce that "other law" is to determine the impact of the ICC's order on the rights protected by the "other law". *E.g., Seaboard Air Line R.R. v. Daniel*, 333 U.S. 118, 122-23 (1948); *McLean Trucking Co. v. United States*, 321 U.S. 67, 79-88 (1944); *see also, ICC v. BLE, supra*, 96 L. Ed.2d at 247 n.13 (Stevens J. concurring).

In *McLean Trucking*, this Court addressed the relationship between the Commission's obligation to consider the policies of overlapping, non-transportation laws and the enforcement of those laws. In that case, which in-

volved the antitrust laws, this Court stated (321 U.S. at 79-80):

> . . . Congress has vested expert administrative bodies such as the Interstate Commerce Commission with broad discretion and has charged them with the duty to execute stated and specific statutory policies. That delegation does not necessarily include either the duty or the authority to execute numerous other laws. . . .
>
> But in executing those policies the Commission may be faced with overlapping and at times inconsistent policies embodied in other legislation enacted at different times and with different problems in view. When this is true, it cannot, without more, ignore the latter. The precise adjustments which it must make, however, will vary from instance to instance depending on the extent to which Congress indicates a desire to have those policies leavened or implemented in the enforcement of the various specific provisions of the legislation with which the Commission is primarily and directly concerned. . . .

McLean Trucking's teachings were amplified in *Seaboard* when this Court raised *sua sponte* the question of whether a State court called upon to decide the impact of an ICC order on a State law had jurisdiction to entertain that suit, or did the federal courts which had jurisdiction to review the ICC order have exclusive jurisdiction over that question. 333 U.S. at 122. This Court concluded that the State court had jurisdiction. In reaching that conclusion, this Court stated (333 U.S. at 123):

> [T]he state court . . . had power, because of the issues raised by the complaint and because of the relief requested, to determine whether the order, properly interpreted, did exempt [the railroad] . . . from compliance with the state railroad corporation laws and, if so, whether the Commission had transcended its statutory authority in making the order.

When these principle are applied to this case, it becomes clear that the ICC, in discharging its duties under

the Interstate Commerce Act, has to consider the impact of its orders on rail labor's rights under other laws, such as the Railway Labor Act.[17] Petitioners fully recognize that the question of whether the ICC has discharged that responsibility is reviewable solely in the courts of appeals under 28 U.S.C. §§ 2321(a) and 2341, *et seq.* However, that question is separate and distinct from the issues of whether the ICC's orders supersede the Railway Labor Act and existing collective bargaining agreements, and whether those non-ICC related rights are enforceable. Those questions, according to *Seaboard* and to four Justices of this Court, are to be decided by the "tribunal that is faced with a claim that a party is violating" the non-transportation statute. *ICC v. BLE*, *supra*, 96 L. Ed.2d at 247 n.13; *see also*, *BLE v. Chicago & North Western Ry.*, *supra*, 314 F.2d at 428.

In this case, the lower courts refused to accept jurisdiction over rail labor's complaint because they assumed the ICC had the responsibility to enforce the public policies behind the Railway Labor Act. Appendix B at 15a. But that assumption is contrary to this Court's holding in *McLean Trucking* and, in light of the ICC's limited role over labor issues, effectively means that those labor policies are being ignored.

III. The Decision Below Ignores The Clear Language Of The Interstate Commerce Act That Rail Exemptions Under 49 U.S.C. § 10505 Do Not Confer An Immunity On The Carriers Participating In That Exempt Transaction

At the heart of the district court's decision in this case (*i.e.*, a case involving a rail exemption) was the conclusion that "Congress has expressly provided, through its enactment of section 11341, that transactions deemed to be in the public interest by the ICC override the rights and duties created by Congress in the RLA." Appendix

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[17] Rail labor has asked the ICC to consider the impact of its rulings on other laws. *See*, note 9, *supra*.

B at 15a. That conclusion, which is the same one reached by the First Circuit in *BLE v. B&M*, *supra*, 788 F.2d at 800, is contrary to the language of the statute, to its legislative history and to the interpretation of that statute by the ICC in rail exemption, non-labor situations. Since the First Circuit has refused to reconsider its holding in *BLE v. B&M* even though rail labor pointed out the inapplicability of Section 11341(a) to rail exemptions, and since this issue is so important to the orderly administration of the two Act of Congress which are at issue here, petitioners ask that this Court exercise its supervisory powers and correct this clear misapplication of an important Act of Congress.

Between 1920 when it was first added to the Interstate Commerce Act as Section 5(8), 41 Stat. 456, 482, until 1982 when it was amended by the Bus Regulatory Reform Act, Pub. L. No. 97-261, 96 Stat. 1102 (1982), Section 11341(a) and its predecessors provided in substance that its immunity extended to "a transaction approved by the Commission under this subchapter . . . ." 92 Stat. 1434 (1978). The subchapter to which Section 11341(a) refers is Subchapter III of Chapter 113, or Sections 11341 to 11351. Rail exemptions, on the other hand, are granted under Section 10505 and the Commission has acknowledged in non-labor cases that the immunity provided by Section 11341(a) does not apply to transactions exempted from regulation by Section 10505.[18] ICC Finance Docket No. MC-F-16248, *Burlington Northern, Inc.—Control Exemption*, served February 13, 1986, op. at 6 (unpub-

[18] The ICC, however, maintains that its orders operate to relieve a rail carrier of its Railway Labor Act and contractual obligations, but that position appears to be premised upon its view that it has exclusive jurisdiction over labor issues arising from a financial transaction subject to its regulation, and not upon an application of Section 11341(a). *See*, ICC Finance Docket No. 31205, *FRVR Corporation—Exemption Acquisition And Operation*, served January 29, 1988, *pet for review pending, RLEA v. ICC*, 8th Cir. No. 88-1280 (that decision is reproduced as Appendix B to the Brief for the NLRC in Sup. Ct. No. 87-1589, *Pittsburgh & Lake Erie R.R. v. RLEA*, filed April 19, 1988).

lished) ("transactions exempted under section 10505, although exempted *from* the regulatory approval requirements of sections 11343 *et seq.*, would appear not to be eligible for that antitrust immunity" conferred by § 11341(a) [emphasis in original]).

In 1982, Congress enacted the Bus Regulatory Reform Act and added to Section 11343 an exemption provision. 96 Stat. at 1122, adding 49 U.S.C. § 11343(e). That provision gave the ICC the power to exempt motor carriers from the prior approval requirements of Section 11343, but it does not apply to pure rail transactions. *Burlington Northern, Inc.—Control, supra.* That Act also amended Section 11341(a) to provide that its immunity provisions would apply to any "carrier . . . participating in . . . a transaction approved by *or exempted by* the Commission under this subchapter . . . ." 49 U.S.C. § 11341(a) (words emphasized added by 96 Stat. at 1122). But again, that immunity does not extend to rail exemptions because those exemptions are not granted under Subchapter III of Chapter 113. *Ex Parte No. 282 (Sub-No. 9), Railroad Consolidation Procedures—Trackage Rights Exemption*, 1 I.C.C.2d 270, 279 (1985). In its recent decision in *Ex Parte No. 282*, the ICC stated as follows (1 I.C.C.2d at 279):

> The addition of "or exempted by" to section 11341(a) does not broaden the scope of section 11341 to reach transactions exempted under section 10505. Section 11341(a) reaches only transactions exempted "under this subchapter", that is, subchapter III of Chapter 113 of the Act. The exemption in this proceeding is under subchapter I of Chapter 105 of the Act. Accordingly, section 11341(a) does not apply to the transactions exempted in this proceeding.

Congress clearly intended to exclude rail exemptions from the immunity granted by Section 11341(a), for it stated in the reports accompanying the Bus Regulatory Reform Act that the amendments to Chapter 113 were not intended "in any way [to] affect the ICC's jurisdiction

with regard to rail transactions under" Section 11343. H. Rpt. No. 97-780, 97th Cong., 2d Sess. at 56 (1982). Construing the amended Section 11341(a) as extending that section's antitrust and "other laws" immunity to rail exemptions would clearly expand the ICC's jurisdiction over rail transactions and would be contrary to this Court's admonition that "exemptions from the antitrust laws are strictly construed and strongly disfavored." *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 421 (1986). On the other hand, excluding rail exemptions from the immunity granted by Section 11341(a) is not unique, for Congress has similarly limited the grant of immunity in airline cases. *Compare*, 49 U.S.C. § 1384 (1976), *with*, § 1384 as amended by Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705; Conference Report, H. Rpt. No. 95-1779, 95th Cong., 2d Sess. at 78 (1978).

Another problem with the lower courts' conclusion that Section 11341(a) evinces Congress' intention "that transactions deemed to be in the public interest . . . override the rights and duties created by Congress in the RLA" (Appendix B at 15a), is that, even if Section 11341(a) were applicable to this case, it would not override the Railway Labor Act rights of the affected employees.[19] All ICC approvals of rail transactions to which Section 11341(a) applies must be conditioned by an arrangement that protects the interests of employees (49 U.S.C. § 11347), and that arrangement must contain provisions "preserv[ing] . . . rights, privileges, and benefits . . . to [the affected] . . . employees under existing collective-bargaining agreements or otherwise; [and] . . . continu[ing] . . . collective bargaining rights." 45 U.S.C.

[19] Recently, the ICC has stated that: "Immunity under section 11341(a) . . . may not be a panacea. Immunity is limited 'to the scope of the issues we are charged to consider in providing our approval' to a transaction." *Ex Parte No. 282, supra*, 1 I.C.C.2d at 279, *quoting Norfolk & Western Ry.—Purchase*, 363 I.C.C. 882, 892 (1981).

§ 565(b)(1) and (2), incorporated into 49 U.S.C. § 11347. Since Section 11341(a) relieves a carrier participating in a lease transaction from the requirements of other laws only in so far "as necessary to let" that carrier carry out the transaction as approved and conditioned by the Commission, no rail carrier can be relieved of its obligations under either the Railway Labor Act or its collective bargaining agreements because Section 11347 requires that those obligations be preserved and continued. Consequently, Section 11347 eliminates the potential for a conflict between the Interstate Commerce Act and the Railway Labor Act to which Section 11341(a) could even arguably apply.

Petitioners respectfully submit that the correct relationships between the transportation and labor statutes is extremely important to the orderly administration of both laws, especially since rail carriers are now using the transportation statute to achieve labor costs reductions which they did not obtain through collective bargaining. Moreover, a final resolution of this issue deserves a full consideration of all of the arguments and not just a blind acceptance of the concept that surely the Interstate Commerce Act is supreme and prevails; that blind assumption, petitioners submit, ignores the fact that the Railway Labor Act, like the transportation statute, is an exercise of Congress' exclusive jurisdiction over interstate commerce. *E.g., UTU v. Long Island R.R.*, 455 U.S. 678, 688-89 (1982).

IV. This Case Presents The Best Vehicle Of The Pending Cases To Decide The Jurisdictional And Substantive Issues Presented By The Railroads' Use Of The Interstate Commerce Act To Obtain Labor Relations Advantages

This case, petitioners submit, presents in a very clear-cut factual situation the major issues raised by the use of the Interstate Commerce Act to override both the Railway Labor Act and existing collective bargaining agreements, for this case was decided on a motion to dismiss

with the factual allegations of the complaint having been supplemented by extensive factual declarations. Indeed, the relevant facts are essentially undisputed, but even if disputed, must be viewed in the light most favorable to petitioners. Moreover, this case, unlike the *RLEA v. Pittsburgh & Lake Erie R.R.* case (*i.e.*, Sup. Ct. No. 87-1888), which is currently before this Court on the railroad's request for a writ of certiorari, involves a factual setting in which the ICC imposed a form of employee protective conditions. Thus, this case has the potential to resolve the question of whether the presence of such conditions, as the district court believed, represents "compensation for the loss of . . . RLA rights" (Appendix B at 15a) and justifies the ICC's belief that such protections are the sole source of employees' rights in dispute arising from ICC exempted or regulated transactions. No employee protections were imposed by the ICC in the *Pittsburgh & Lake Erie* case.

In short, this case presents the best vehicle available today to resolve the crucial issues which are placing an intolerable strain on labor relations in the rail industry.

CONCLUSION

For the reasons set forth herein, petitioners respectfully request that this Court issue a writ of certiorari to the United States Court of Appeals for the First Circuit to review its judgment in *RLEA v. GTI, supra.*

Respectfully submitted,

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Date: May 23, 1988

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 87-1774

RAILWAY LABOR EXECUTIVES 'ASSOCIATION, *et al.*,
Plaintiffs, Appellants,

v.

GUILFORD TRANSPORTATION INDUSTRIES, INC., *et al.*,
Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE

[Hon. Gene Carter, *U.S. District Judge*]

Before

Campbell, *Chief Judge*,
Torruella and Selya, *Circuit Judges.*

John O'B. Clarke, Jr., with whom *Highsaw & Mahoney, P.C.*, *Craig J. Rancourt* and *Law Office of Craig J. Rancourt* were on brief for appellants.

Ralph J. Moore, Jr., with whom *D. Eugenia Langan, Jonathan T. Weinberg, Shea & Gardner, Charles S. Einsiedler, Jr.*, and *Pierce, Atwood, Scribner, Allen, Smith & Lancaster* were on brief for appellees.

January 20, 1988

Per Curiam. Counsel for appellants has conceded that the decision of this court in *Brotherhood of Locomotive Engineers* v. *Boston & Maine Corp.*, 788 F.2d 794 (1st Cir.), *cert. denied*, 107 S. Ct. 111 (1986), controls this appeal. We have consistently held in such circumstances that the error-correcting function (if any error there be) should ordinarily be reserved to court en banc, not seized by a successor panel. *See Lacy* v. *Gardino*, 791 F.2d 980, 985 (1st Cir.), *cert. denied*, 107 S. Ct. 284 (1986). We see no reason to depart from that prudential rule in this instance. Simply put such departure "demands special justification", *Arizona* v. *Rumsey*, 467 U.S. 203, 212 (1984), and there has been no such showing here. Contrary to appellant's argument, Justice Stevens' opinion in *ICC* v. *Brotherhood of Locomotive Engineers*, 107 S. Ct. 2360, 2370 (1987) (Stevens, J., concurring), casts no large shadow of doubt over our earlier decision in *Brotherhood of Locomotive Engineers* v. *Boston & Maine Corp.*, *supra*. Nor have any compelling reasons been advanced which make us believe that reconsideration of our recent precedent should be undertaken or recommended by this panel.

Accordingly, we summarily affirm the district court's dismissal of this action on the basis of the panel opinion in *Brotherhood of Locomotive Engineers* v. *Boston & Maine Corp.*, *supra*. *See* First Circuit Local Rule 34.1.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Plaintiffs

v.

GUILFORD TRANSPORTATION INDUSTRIES, INC., BOSTON AND MAINE CORPORATION, DELAWARE & HUDSON RAILWAY COMPANY, MAINE CENTRAL RAILROAD COMPANY, PORTLAND TERMINAL COMPANY, and SPRINGFIELD TERMINAL COMPANY,
Defendants

Civil No. 87-0034-P

CARTER, District Judge

MEMORANDUM OF DECISION AND ORDER

Currently before the Court are the following motions: Plaintiffs' Motion for Reconsideration of the Court's Order of January 30, 1987; Defendants' Motions to Dismiss Complaint;[1] and Plaintiffs' Motion for Interlocutory Injunctive Relief. For the reasons discussed fully below, the Court finds that it lacks jurisdiction and dismisses the action.

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[1] All defendants have joined in a Motion to Dismiss for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1), (6). Defendant Guilford Transportation Industries, Inc. (Guilford) has also filed a separate motion to dismiss. In its separate motion, Guilford argues that if the Court retains jurisdiction over the action, Guilford is not a proper party. Due to the Court's disposition of the action on jurisdictional grounds, the Court does not reach the issue raised in Guilford's separate motion.

Plaintiffs Railway Labor Executives' Association [2] have brought this action for declaratory judgment and injunctive relief against Defendants Guilford Transportation Industries, Inc. (Guilford), Boston and Maine Corporation (B&M), Delaware & Hudson Railway Company (D&H), Maine Central Railroad Company (MEC), Portland Terminal Company (PT), and Springfield Terminal Company (ST) in response to the pending implementation of a number of leases among the various Defendants.[3]

Plaintiffs allege that the present pattern of intracorporate leases is just yet another step in Defendants' "systematic and deliberate plan to effect without bargaining the changes in rules and working conditions" which Defendants have heretofore failed to accomplish within the statutory requirements of the Railway Labor Act. Plaintiffs' Complaint for Declaratory Judgment and Injunctive

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[2] Plaintiffs include the Railway Labor Executives' Association, the International Federation of Professional and Technical Engineers, and the following 14 member organizations of the Association: American Railway and Airway Supervisors Association (Division of BRAC); American Train Dispatchers Association; Brotherhood of Locomotive Engineers; Brotherhood of Maintenance of Way Employes; Brotherhood of Railroad Signalmen; Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes; Brotherhood Railway Carmen (Division of BRAC); International Association of Machinists and Aerospace Workers; International Brotherhood of Boilermakers and Blacksmiths, Iron Ship Builders, Blacksmiths, Forgers and Helpers; International Brotherhood of Electrical Workers; International Broherhood of Firemen and Oilers; Railroad Yardmasters of America (Division of UTU); Sheet Metal Workers' International Association; and United Transportation Union.

[3] The leases challenged by this action include: leases between B&M and ST, Finance Docket Nos. 30791, 30925,* 30951,* 30955, 30966,* 30981,* 30993,* 31003, 31015; leases between MEC and ST, Finance Docket Nos. 30967,* 31002,* 31023; and leases between D&H and ST, Finance Docket Nos. 30965, 30972, 31003. The seven docket numbers marked with an asterisk represent leases that have been implemented.

Relief ¶ 13, at 5. *See Railway Labor Executives' Ass'n v. Boston & Maine Corp.*, No. 86-0273-P, slip op. at 2-3 n. 3 (D. Me. July 8, 1987) (citing cases detailing history of labor dispute between parties). Count I alleges that Defendants are or will be in violation of a 1982 order of the Interstate Commerce Commission (ICC), Finance Docket No. 29720 (Sub-No. 1), by implementing the leases. Count II alleges that Defendants have willfully and deliberately violated various sections of the Railway Labor Act, 45 U.S.C. §§ 151-163 (1982). Plaintiffs allege that the Court has jurisdiction under 28 U.S.C. §§ 1331, 1336(a), and 1337(a), and under 49 U.S.C. § 11705.

I.

The underlying facts are not, at this juncture, complex. In 1982, Guilford, which already owned MEC and its subsidiary PT, obtained the approval of the ICC under section 11343 of the Interstate Commerce Act, 49 U.S.C. § 11343 (1982) (the Act), to acquire control of both D&H and B&M, including B&M's subsidiary ST. *See* ICC Finance Docket Nos. 29720 (Sub-No. 1) and 29772 (the 1982 orders). These acquisitions resulted in the corporate affiliation of the Defendants now before the Court. As part of its approval, the ICC imposed arrangements for the protection of employee interests known as the *New York Dock* [4] conditions.

Subsequent to the above acquisitions, Guilford sought and received notices of exemption by the ICC under section 10505 of the Act, 49 U.S.C. § 10505, which allow Guilford to implement the leases challenged by this ac-

[4] The *New York Dock* conditions were developed in *New York Dock Ry.—Control—Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979). These conditions are important to Plaintiffs because they require that employees affected by any transaction receive at least 90 days advance notice and that an implementing agreement be negotiated between all parties to the transaction before the transaction is consummated.

tion. *See, e.g.*, Finance Docket Nos. 30965, 30967. On December 30, 1986, MEC served a notice of the proposed lease transaction on the affected unions; the next day, Plaintiffs filed petitions with the ICC under the relevant dockets requesting that the ICC determine that the appropriate employee protective provisions are the *New York Dock* conditions imposed in the 1982 orders and not the *Mendocino Coast*[5] conditions usually imposed on exempt lease transactions. On January 14, 1987, the ICC released its decision acknowledging Plaintiffs' petitions and indicating that it would issue a subsequent decision on the issue raised therein. Finance Docket No. 30967. The parties still await the ICC's decision.[6] In the interim, Defendants are apparently required to adhere to the *Mendocino Coast* conditions in the implementation of the MEC leases.

Plaintiff filed the present case in this Court on January 28, 1987; they sought a temporary restraining order on January 29, just two days prior to the February 1st effective date of the challenged MEC lease. On January 30th, the Court denied the motion for temporary relief and dismissed Count I of the Complaint for lack of subject matter jurisdiction or, in the alternative, declined jurisdiction as to Count I because the issue fell within the primary jurisdiction of the ICC. *Railway*

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[5] *Mendocino Coast* conditions were developed in *Mendocino Coast Ry., Inc.—Lease and Operate*, 354 I.C.C. 732 (1978), *as modified at* 360 I.C.C. 653 (1980), *aff'd sub nom. Railway Labor Executives' Ass'n v. United States*, 675 F.2d 1248 (1982). Under *Mendocino Coast*, employees affected by a transaction receive 20 days advance notice, and the transaction may be consummated before an implementing agreement is negotiated between the lessee and lessor railroads and the affected labor interests.

[6] On May 12, 1987, the ICC released another decision which also deferred resolution of the employee protection issue pending the receipt of additional evidence and further investigation. Finance Docket No. 30965 (also encompassing Finance Docket Nos. 30967, 30972, 30981, 30993, 31002, 31003).

Labor Executives' Ass'n v. Guilford Transp. Indus., 653 F. Supp. 643, 645 (D. Me. 1987). The Court turns now to the arguments presented by the parties with respect to each count of the Complaint.

II. Count I

In seeking reconsideration of the Court's prior order, which dismissed Count I, Plaintiffs advance three separate requests. First, Plaintiffs ask the Court to retain jurisdiction of Count I. Second, Plaintiffs renew their request for injunctive relief pending the outcome of the ICC petitions. Finally, Plaintiffs ask that the Court stay further proceedings on Count I, including any referral of the determinative factual question to the ICC, until the ICC rules on Plaintiffs' petitions in the lease cases.

A. Jurisdiction

In pressing their original request for temporary relief, Plaintiffs did not address with specificity the issue of the Court's jurisdiction, nor did Defendants raise the issue in the brief time available for a response; neither party mentioned the doctrine of primary jurisdiction. Because Count I sought enforcement of the 1982 orders,[7]

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[7] The enforcement powers of the Court derive from section 11705 of the Interstate Commerce Act, which provides in part:

> (a) A person injured because a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title does not obey an order of the Commission, except an order for the payment of money, may bring a civil action to enforce that order under this subsection.
>
> . . . .
>
> (b)(2) A common carrier providing transportation subject to the jurisdiction of the Commission under subchapter I or III of chapter 105 of this title is liable for damages sustained by a person as a result of an act or omission of that carrier in violation of this subtitle.
>
> . . . .
>
> (c)(1) A person may file a complaint with the Commission under section 11701(b) of this title or bring a civil action

the Court determined that Plaintiffs' right to relief depended on the resolution of the following factual question within the primary jurisdiction of the ICC: whether the challenged lease transactions fall within the scope of the 1982 orders. Because the question was pending before the agency, the Court also determined that it lacked subject matter jurisdiction. *Id.* Plaintiffs now expressly argue that under section 11705(a) of the Act[8] the Court has jurisdiction to enforce the 1982 orders and should retain jurisdiction while the ICC determines the above-stated predicate factual issue, a determination which Plaintiffs concede is within the primary jurisdiction of the ICC. Defendants counter that the Court's dismissal of the action is appropriate under the guidelines articulated in *Far East Conference v. United States*, 342 U.S. 570 (1952). Having now had the benefit of full briefing on the issue, particularly Plaintiffs' position regarding the referral option, the Court determines that no purpose would be served by retaining jurisdiction and therefore reaffirms its prior dismissal of Count I, clarifying any ambiguity that may have arisen from its prior discussion of referral.

The Court's reasoning rests on the unique relationship between the case pending before it and the several petitions pending before the ICC. Plaintiffs made an initial strategic choice to pursue their challenges to the present leases in the context of the exemption notices before the ICC. The alternative would have been to initiate an enforcement action of the 1982 orders, either by filing an action in this Court under section 11705(a) or by seeking a declaratory order from the ICC under

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> under subsection (b)(1) or (2) of this section to enforce liability against a common carrier providing transportation subject to the jurisdiction of the Commission under subchapter I or III of chapter 105 of this title. . . .

49 U.S.C. § 11705(a), (b)(2), (c)(1) (1982).

[8] *See supra* note 7.

section 11701, 49 U.S.C. § 11701(b). Plaintiffs chose to proceed in the exemption context because they perceived that their petitions would afford them the most immediate relief.[9] In their petitions before the ICC, Plaintiffs expressly raised the argument that the leases are transactions within the meaning of the 1982 orders. *See, e.g.*, Finance Docket No. 30967, 52 Fed. Reg. 2625 (1987). When, however, the ICC deferred its decision as to whether "the *New York Dock* conditions should also apply to this lease transaction, because it is allegedly just another transaction to further the control benefits attributable to the original acquisition of MEC by [Guilford]"), *id.*, Plaintiffs raised the same issue in the present enforcement action in this Court.

In issuing the January 30 Order, the Court expressed its concerns about ruling on an issue currently pending before the ICC. One concern is, of course, that the ICC action may moot the issue before this Court. This possibility may, however, be easily addressed by the Court staying any action until the ICC rules. Nevertheless, another concern counterbalances the wisdom of issuing a stay: if Plaintiffs have a right to have their claim resolved by this Court, the Court should not avoid its duty to render the appropriate relief. This concern may counsel immediate referral to the ICC of the determinative factual question, directing the ICC to address the issue and thus preserving Plaintiffs' rights.[10] But as the brief-

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[9] *See* Plaintiffs' Memorandum in Support of Motion for Reconsideration at 7: "[I]f the Commission did not impose the *New York Dock* conditions in the lease cases, the notice and negotiation protections [provided by *New York Dock*] would be lost while the applicability of those conditions to the lease transactions was litigated."

[10] It is possible that the ICC may resolve the issues pending before it without reaching the factual question presented by Count I. The Court notes that in a recent unpublished opinion, the ICC indicated that it was deferring the resolution of the appropriate level of employee protection for the challenged leases both in light

ing has expanded in this case, it is now apparent that the Court's initial concern about its jurisdiction provides the most significant justification for allowing the ICC to act first on all issues.

By bringing an enforcement action in this Court while the same issue is pending before the ICC in actions involving essentially the same relief, it appears to the Court that Plaintiffs have made a creative attempt to avoid the requirement of section 11705 that they make an election between the forums provided by the ICC and by this Court. *See, e.g., Louisville & N.R.R. v. Ohio Valley Tie Co.*, 242 U.S. 288, 291 (1916) (requiring claimant to elect between a complaint to the Commission and a civil action; decided under former 49 U.S.C. § 9). Plaintiffs' reluctance to have the issue referred to the ICC for determination highlights the problems created by their attempt to have both forums remain the forum of first instance.

Plaintiffs have requested that the Court, if it were to retain jurisdiction, "not refer [the determinative] issue to the ICC at this time." Plaintiffs' Memorandum in Support of Motion for Reconsideration at 7. Plaintiffs' request rises from their desire to avoid jurisdictional conflicts between this Court and the court of appeals, for this Court would retain jurisdiction over the referred question while the court of appeals would have jurisdiction over any results flowing from the petitions before

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of the status of these transactions under the 1982 orders and in light of independent factual issues such as the number of similar leases which exist in the Guilford corporate structure, whether these leases have a cumulative effect different from that which usually occurs in lease transactions, whether Guilford plans to initiate other leases in the near future, and the impact of the leases on Defendants' employees including a consideration of the manner in which Guilford is implementing the leases. Finance Docket No. 30965 (May 12, 1987), Plaintiffs' App. C.

the ICC. 28 U.S.C. § 1336(b), 2321(a), and 2341.[11] In the Court's view, it is precisely this type of conflict that is avoided by the election requirement of section 11705. Having initiated their fight before the ICC, Plaintiffs cannot in fairness avoid having the ICC remain the battlefield for all other initial skirmishes. If, as a result of the Court's dismissal of Count I, Plaintiffs are required to bring an original action before the ICC, the potential jurisdiction conflicts may be avoided, and Plaintiffs will have an opportunity to have their rights fully vindicated. Thus, even if the statute did not require an election between forums, the avoidance of forum shopping and the difficulties that overlapping forums present in light of the overall statutory scheme justify dismissal in this case. *See Montgomery Environmental Coalition v. Washington Suburban Sanitary Comm'n*, 607 F.2d 378, 382-83 (D.C. Cir. 1979) (finding dismissal proper where retention of jurisdiction by district court would conflict with appellate review of action by EPA).

Finally, even if the duplicity of forums were not determinative of the issue, Plaintiffs have not demonstrated that dismissal would be improper. In deciding whether to stay the action pending referral or to dismiss, the Court must determine whether dismissal will prejudice any party. *United States v. Michigan Nat'l Corp.*, 419 U.S. 1, 4-5 (1974); *Far East Conf.*, 342 U.S. at 577. Plaintiffs advance two arguments in support of the

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[11] Plaintiffs have also argued, however, that if the ICC decides, in the context of the pending petitions, that the challenged leases fall within the 1982 orders, Plaintiffs will ask the Court to enforce the 1982 orders on the basis of the new decision. In effect, Plaintiffs would have an enforcement action pending in this Court while the determinative questions are being resolved in a separate action before the ICC. It appears to the Court, however, that any enforcement action would flow from the new ICC orders. Although this issue is not squarely before the Court at this juncture, it does highlight the difficulties raised by the Plaintiffs' invocation of multiple forums.

Court's continued jurisdiction: one, Plaintiffs' concurrent request for injunctive relief bars dismissal; and two, Count I is inextricably tied to Count II. The Court addresses each in turn.

B. Request for Injunctive Relief

Plaintiffs' first argument is curious for Plaintiffs do not argue that they could not receive the same injunctive relief in an action before the ICC. More importantly, it appears from the record that Plaintiffs have requested this relief from the ICC in at least some of their petitions in the lease exemption notices. *E.g.*, Finance Docket No. 30965, at 2 n. 2 (May 12, 1987). The III has specifically rejected Plaintiffs' argument that they would be irreparably harmed if the lease transactions were consummated before the issue of employee protection conditions is decided. The ICC noted that even under the *Mendocino Coast* conditions, employees have a complete remedy at law to be "made whole" if the implementations proceed before the implementing agreements are negotiated. *Id.* Having had this issue resolved against them in the administrative context, Plaintiffs may not now come to this Court and argue that jurisdiction must be retained so that they might ask the Court for identical relief.

C. The Relationship of Count I to Count II

Plaintiffs' second argument centers on their allegation that some unspecified prejudice may result from the dismissal of Count I while Count II is pending before the Court. Because the Court finds, *see infra* Part III, that it also lacks jurisdiction over Count II, Plaintiffs' argument must fail on this ground.

The parties have not raised any additional claim of prejudice. Since it does not appear to the Court that there is any impediment to the Plaintiffs' initiating before the ICC the request for relief encompassed by Count

I, if Plaintiffs have not already done so in their pending petitions, the Court finds that dismissal for want of jurisdiction is proper.

III. Count II

In Count II of their Complaint, Plaintiffs allege that Defendants have violated various sections of the Railway Labor Act (RLA) by implementing the challenged leases. The allegation rests on three grounds: one, because the leases affect existing rates of pay, rules and working conditions, Defendants must bargain with Plaintiffs over these changes within the procedures provided by the RLA; two, in various agreements among the parties, Defendants have bargained away their right to lease their properties [12]; and three, Defendants have interfered with the rights of their employees to be represented by the labor organization of the employees' choice by communicating directly with their employees regarding the employment options under the leases.

Defendants argue that, regardless of whether Plaintiffs' allegations state a claim under the RLA, any RLA claim is preempted by the exemption found in section 11341(a) of the Act, 49 U.S.C. § 11341(a).[13] Plaintiffs

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[12] Paragraph 30 of the Plaintiffs' Complaint alleges that various agreements and practices between the parties prohibit Defendants from transferring work which is being performed by their employees to others without prior notice and negotiation. Because the motion before the Court is a motion to dismiss, the Court is required to construe the Complaint in the light most favorable to Plaintiffs, *see* 5 C. Wright & A. Miller, *Federal Practice & Procedure* § 1357, at 594 (1969), and therefore construes the above allegation as encompassing the argument advanced by Plaintiffs. By construing the Complaint liberally in favor of Plaintiffs, the Court does not imply any position regarding whether this construction of the allegation is supported by the as yet undeveloped facts of this case.

[13] Section 11341 provides in pertinent part:

> The authority of the Interstate Commerce Commission under this subchapter is exclusive. A carrier or corporation partici-

have countered Defendant's argument by presenting the Court with a comprehensive analysis of the controlling statutory provisions and their legislative history. Were the Court writing on a clean slate, Plaintiffs' arguments would need to be commented upon in depth. Here, however, the Court finds that its decision is controlled by *Brotherhood of Locomotive Engineers v. Boston & Maine Corp.*, 788 F.2d 794 (1st Cir.), *cert. denied*, 107 S. Ct. 111 (1986).

In *Boston & Maine*, the First Circuit considered whether section 11341 of the Act precluded a party who was adversely affected by the implementation of a section 10505-exempted lease from pursuing claims that would otherwise fall within the jurisdiction of the federal courts under the RLA. *Id.* at 796-99. The Circuit held that the exemption provided by section 11341 relieves the participants from *any* legal obstacles that would impede the transaction. *Id.* at 800.

Plaintiffs have attempted to distinguish their claims from the *Boston & Maine* case by emphasizing the following three sets of facts: one, that in *Boston & Maine*, the ICC had specifically considered the effect of the lease on the parties' rights in the underlying exemption proceeding, where here Plaintiffs have raised these issues before the Court; two, the present case includes an allegation

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pating in or resulting from a transaction approved by or exempted by the Commission under this subchapter may carry out the transaction, own and operate property, and exercise control or franchises acquired through the transaction without the approval of a State authority. A carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction. . . .

49 U.S.C. § 11341(a) (1982).

that Defendants had no right to enter the leases; and three, even under the section 11341 exemption, Defendants have no right to deal directly with their employees regarding the ICC-imposed employee protection conditions. The Court, however, finds *Boston & Maine* to be equally applicable to the present case and thus controlling precedent.

First, in formulating the relevant employee protection conditions to be applied to the challenged leases, the ICC is currently contemplating the effect of the leases on the collective bargaining rights of Defendants' employees. *See* Finance Docket No. 30965 (May 12, 1987) (unpublished). Plaintiffs' first argument thus loses much of its force in light of the ICC's contemporaneous consideration of this issue and the discretion vested in the ICC to "require the carrier to provide a fair arrangement" to employees whose interests are affected by the exempted transaction. 49 U.S.C. § 11347.

Second, the law of this Circuit is that Congress has expressly provided, through its enactment of section 11341, that transactions deemed to be in the public interest by the ICC override the rights and duties created by Congress in the RLA. Although Plaintiffs lose whatever their rights would be under the RLA, Plaintiffs have not lost all for they have a remedy—and are in fact concurrently pursuing it—compensation for the loss of their RLA rights. This remedy is provided by the ICC. Therefore, the forum for raising these arguments is the forum provided by that agency.

Finally, the breadth of the exemption contained in section 11347 [*sic*] also vitiates whatever force the remaining factual distinctions raised by Plaintiffs may have. Consequently, in accordance with the ruling of the First Circuit, the Court finds that it is without jurisdiction to consider claims ordinarily cognizable by this Court under the RLA where the alleged claims arise directly out of a lease transaction granted a statutory exemption by the ICC under the controlling statute. *Cf. Maine Cent. R.R.*

v. Brotherhood of Maintenance of Way Employees, 652 F. Supp. 40, 42 (D. Me. 1986) (finding that dispute concerning job protection benefits did not arise directly out of transaction approved by the ICC).

IV.

Over the course of this labor dispute, the parties have been repeatedly successful in invoking the jurisdiction of this Court to enforce the mandates of the RLA. Defendants' goal in these proceedings has not been hidden; they have sought and continue to seek a streamlined work force and the implementation of their conception of a cost-efficient labor agreement. Defendants' efforts, however, have been remarkably unsuccessful, due in part to their failure to reach a meaningful agreement with the unions involved and in part to the almost interminable procedures of the RLA, procedures which have been upheld by various decisions of this Court and which have been supplemented by various actions of both Congress and the President. Nevertheless, Defendants have now apparently discovered an alternate method to achieve a similar goal. Although the Court has examined the record presented in this case and has considered with care the arguments raised by Plaintiffs, the Court finds that Plaintiffs have presented their request for relief to the wrong forum. The relief they request is available only from the ICC and not from this Court. Accordingly, the Court hereby *GRANTS* Defendants' Motion to Dismiss and *DENIES* Plaintiffs' Motion for Reconsideration, Injunctive Relief, and Stay.

So *ORDERED*.

/s/ Gene Carter
GENE CARTER
United States District Judge

Dated at Portland, Maine this 27th day of July, 1987.

APPENDIX C

INTERSTATE COMMERCE COMMISSION
CORRECTED DECISION*

Finance Docket No. 30965

DELAWARE AND HUDSON RAILWAY COMPANY—LEASE AND TRACKAGE RIGHTS EXEMPTION—SPRINGFIELD TERMINAL RAILWAY COMPANY[1]

Decided: February 17, 1988

Service Date: February 25, 1988

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* This corrects the decision served February 19, 1988, to reflect the modifications on pages 10, 12, and 13 that had been adopted by the Commission.

[1] This decision embraces Finance Docket No. 30967, *Maine Central Railroad Company—Lease Exemption—Springfield Terminal Railway Company*; Finance Docket No. 30972, *Delaware and Hudson Railway Company—Lease and Trackage Rights Exemption—Springfield Terminal Railway Company*; Finance Docket No. 30981, *Boston and Maine Corporation—Lease—Springfield Terminal Railway Company*; Finance Docket No. 30993, *Boston and Maine Corporation—Lease and Trackage Rights Exemption—Springfield Terminal Railway Company*; Finance Docket No. 31002, *Maine Central Railroad Company—Lease and Trackage Rights Exemption—Springfield Terminal Railway Company*; Finance Docket No. 31003, *Delaware and Hudson Railway Company and Boston and Maine Corporation—Lease and Trackage Rights Exemption—Springfield Terminal Railway Company*; Finance Docket No. 31015, *Boston and Maine Corporation—Lease and Trackage Rights Exemption—Springfield Terminal Railway Company*; Finance Docket No. 31023, *Maine Central Railroad Company—Lease Exemption—Springfield Terminal Railway Company*; Finance Docket No. 31086, *Maine Central Railroad Company and Portland Terminal Company—Lease Exemption—Springfield Terminal Railway Company*; Finance Docket No. 30955, *Boston and Maine Corporation—Lease Exemption—Springfield Terminal Railway Company*; Finance Docket No. 31103, *Boston and Maine Corporation and Delaware and Hudson Railway Company—Lease and Trackage Rights Exemption—Springfield Terminal Rail-*

INTRODUCTION

The investigation that the Commission has instituted and recently concluded into the transactions that are the subject of this proceeding clearly establishes that a series of leases from four rail carrier subsidiaries of Guilford Transportation Industries, Inc. (GTI), to a fifth carrier subsidiary, the Springfield Terminal Railway Company (ST), have, taken together, substantially injured GTI's employees. We are, therefore, imposing extraordinary labor protective conditions on these transactions.

Our actions are taken to protect the interests of GTI's employees. We find that while GTI's actions fall within the letter of our regulations at 49 C.F.R. 1180.2(d)(3), the manner in which GTI has proceeded in implementing these intracorporate leases has undermined its credibility and has contributed to a loss of confidence in its ability to provide adequate and efficient rail service in New England. Prompt good faith compliance with the terms

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way Company; Finance Docket No. 31115, *Boston and Maine Corporation and Delaware and Hudson Railway Company—Lease and Trackage Rights Exemption—Springfield Terminal Railway Company*; Finance Docket No. 31125, *Delaware and Hudson Railway Company—Lease Exemption—Springfield Terminal Railway Company*; and Finance Docket No. 31161, *Delaware and Hudson Railway Company—Operating Agreement and Assignment of Trackage Rights—Springfield Terminal Railway Company*.

In addition, the GTI carriers filed notices of exemption in Finance Docket No. 30925, *Boston and Maine Corporation—Lease and Trackage Rights Exemption—Springfield Terminal Railway Company*; Finance Docket No. 30951, *Boston and Maine Corporation—Lease Exemption—Springfield Terminal Railway Company*; and Finance Docket No. 30966, *Boston and Maine Corporation—Lease—Springfield Terminal Railway Company*. Although the labor interests had not previously asked that these notices be consolidated into this proceeding, they have since filed petitions seeking revocation of the exemptions for these notices. GTI filed a reply. Because the underlying transactions are closely related to the other GTI transactions, we are including these notices in this proceeding.

of this order would constitute a significant first step toward the restoration of that confidence.

Through a series of leases and trackage rights arrangements, discussed in more detail below, GTI has in effect restructured its operations so that one of its five rail carrier subsidiaries will henceforth be conducting all of its rail operations. While pursuing this course, GTI has failed to keep its employees fairly apprised of their rights and responsibilities under Commission-imposed labor protective conditions. Some of the information given by GTI was misleading and some was wrong. In other instances, GTI has appeared slow to provide the protection to which its employees are entitled.

To remedy this situation, we will impose on the transactions involved labor protective conditions that are different from those imposed in the usual lease and trackage rights transactions. We will also require that the parties engage in dispute resolution through negotiation of an implementing agreement between all of the GTI carriers and the employees of all the carriers, and, if necessary, binding arbitration. By imposing these conditions we will ensure that employees who were adversely affected by the transactions or were victims of the confusion about protective benefits receive the compensation that would have been accorded had labor protection provisions been properly administered by GTI under the circumstances.

SUMMARY

These proceedings involve use of the notice of exemption procedures set forth at 49 CFR 1180.4(g) in connection with transactions within a corporate family. *See* 49 CFR 1180.2(d)(3). The notices of exemption were filed concerning lease and trackage rights transactions involving the following wholly owned subsidiaries of GTI: ST, Delaware and Hudson Railway Company (D&H), Maine Central Railroad Company (MEC), Bos-

ton and Maine Corporation (B&M), and Portland Terminal Company (PT) (collectively referred to as "GTI" or "the GTI carriers"). The earliest notice (Finance Docket No. 30925) was filed on October 22, 1986, and the most recent (Finance Docket No. 31161) on November 17, 1987.

The labor protective conditions typically imposed as the minimum protection in lease and trackage rights transactions as set forth in *Mendocino Coast Ry. Inc.—Lease and Operate*, 354 I.C.C. 732 (1978) and 360 I.C.C. 653 (1980),[2] and *Norfolk and Western Ry. Co.—Trackage Rights—BN*, 354 I.C.C. 605 (1978), as modified in *Mendocino Coast, supra*, 360 I.C.C. 653 (1980), adequately protect the interests of rail employees in normal lease and trackage rights situations and have been found to satisfy the statutory requirement of 49 U.S.C. 11347 that carriers involved in transactions under 49 U.S.C. 11344 provide fair arrangements for protection of their employees. Here, however, the Railway Labor Executives' Association (RLEA) and the Brotherhood of Locomotive Engineers (BLE) have sought revocation of the exemptions, or a change in the conditions for exemption, arguing that the labor protective conditions that were imposed in all of the cases are inadequate, and they seek a greater level of employee protection.[3] They argue that

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[2] *Aff'd sub nom. Railway Labor Executives' Association* v. *United States*, 675 F.2d 1248 (1982), *See* Finance Docket No. 30532, *Maine Central R.R., et al.—Exemption* (not printed), served September 13, 1985, *aff'd sub nom. Railway Labor Executives' Association* v. *ICC*, No. 85-1636 (D.C. Cir. March 16, 1987).

[3] RLEA filed, between December 31, 1986 and December 8, 1987, petitions for revocation of the exemption and/or petitions for relief not otherwise covered in Finance Docket Nos. 30925, 30951, 30955, 30965, 30966, 30967, 30972, 30981, 30993, 31002, 31003, 31015, 31023, 31086, and 31103.

BLE filed, between February 1, 1987, and November 27, 1987, petitions to reopen and for relief not otherwise covered in Finance Docket Nos. 30981, 30993, 31003, 31015, 31103, 31125, and 31161.

RLEA filed its post-oral argument brief on December 8, 1987, accompanied by separate motions "for leave to file brief, time for

the labor protective conditions developed by the Commission in *New York Dock Ry.—Control—Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979), are more appropriate for these transactions and should be imposed in lieu of the *Mendocino Coast* and *Norfolk and Western* conditions.[4]

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filing having expired," and "for leave to file brief in excess of thirty pages." With its brief and motions, RLEA filed four separate petitions "for revocation of the exemption" in Finance Docket No. 30965, *et al.*, Finance Docket No. 30925, Finance Docket No. 30951, and Finance Docket No. 30966.

In support of its motion to late-file its brief, RLEA notes that its counsel was unable to file timely due to responsibilities in several other legal matters, some of which involve RLEA. RLEA also explains that the arguments set forth in its brief extend to the four simultaneously filed petitions for revocation, and that, therefore, the length of its brief will conserve and consolidate its arguments in these related matters. RLEA submits that the late filing and the length of its brief will neither prejudice the parties nor unduly delay the prompt resolution of this proceeding.

The limited delay resulting from RLEA's late filing and the excess length of its brief are insignificant when viewed in light of the extensive record, the length of the proceedings, and the importance of the issues to be resolved here. We will therefore grant RLEA's motions for leave to late-file its brief and for leave to file its brief in excess of the page limitation.

On August 18, 1987, GTI filed a motion to strike certain RLEA reply materials, or, alternatively, to submit further evidence. In view of our October 5th request that the parties submit further evidence, GTI's argument is mooted and its motion is denied.

On October 20, 1987, RLEA filed a motion to supplement a declaration and to file executed copies of other declarations it had filed on October 15, 1987. RLEA cited time constraints that prevented filing of executed declarations by October 15th, and indicated that the other declaration should be supplemented due to changes of material fact. RLEA's request will not delay the proceeding or prejudice any party. The motion is granted.

[4] The substantive benefits under *New York Dock* are virtually identical to those under *Mendocino Coast* and *Norfolk and Western*. *New York Dock*, however, does provide labor certain procedural advantages. First, the transaction cannot be consummated unless an implementing agreement between the carrier and the labor interest is already in place. By contrast, under *Mendocino Coast* and *Norfolk*

They argue in the alternative that the exemption is not appropriate and should be revoked for these transactions. The GTI carriers, on the other hand, believe that their actions were correct and that the proper labor conditions have already been imposed.[5]

Upon review of the record, we chose to fashion a remedy appropriate to the circumstances, and provide the opportunity for effective adjustment and resolution of

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and Western, if the transaction is consummated prior to the implementing agreement, the substantive benefits are applied retroactively. Second, employees who may be adversely affected by a transaction must receive at least 90 days prior notice under *New York Dock*, while only a 20-day notice period is provided under *Mendocino Coast* and *Norfolk and Western*. Finally, by custom and usage, there is a difference as to the parties to the implementing agreements required by the *New York Dock* labor protective conditions, on the one hand, and the *Mendocino Coast* and *Norfolk and Western* conditions, on the other. In the former, an implementing agreement must be arrived at between all parties to the proposed consolidation and the employees of all the parties. In the latter, implementing agreements are required only between the lessor/grantor of trackage rights and its employees, on the one hand, and between the lessee/grantee of trackage rights and its employees, on the other.

[5] The labor organizations' responses to the GTI notices of exemption raised the issue of the appropriate level of labor protection for these transactions. For example, in Finance Docket No. 30965, served January 22, 1987, our notice imposed *Mendocino Coast* conditions but advised the parties of RLEA's petition requesting *New York Docket* protective conditions and noted that "[a] separate Commission decision will follow to consider which conditions should be imposed."

As the number of GTI filings increased, we alerted the railroads to the possible consequences of their actions. For example, several months later in Finance Docket No. 31115, served October 9, 1987, our notice advised the parties that "[i]f, prior to the Commission's determination of the appropriate level of labor protection for these GTI transactions, B&M and D&H consummate this transaction and provide employees with *Mendocino Coast* protection, they do so at their own risk. Should the Commission subsequently determine that a higher level of protection is required, B&M and D&H will be required to provide employees with that greater protection."

disputes in this unusual situation. Thus, we conclude that imposition of extraordinary conditions, rather than ordering revocation, would better ensure that rail employees and services are adequately protected in this particular instance.[6]

Recognizing that various transactional activities have transpired over the period of time since October, 1986, we believe that ordering revocation at this time may be counterproductive. Moreover, noting the substantive benefits of conditions under *New York Dock*, *Mendocino Coast* and *Norfolk and Western*, are virtually identical, albeit with significant procedural distinctions,[7] we find it possible to use elements of those substantive benefits and tailor the procedures to fit the particular circumstances of this case.[8]

We, therefore, direct that: (1) the process for formulating an implementing agreement for all of the transactions (and any arbitration process) will include as participants ST, B&M, D&H, MEC, and PT, and the employees (or their representatives) of all of these rail carriers; (2) the parties will have 90 days to reach an implementing agreement (if, after 20 days, no agreement has been reached, any party may seek to submit the controversy to binding arbitration); and (3) GTI shall not implement the D&H and unconsummated B&M

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[6] Commission authority to do so can not be seriously doubted. See e.g. *New York Central Sec. Corp. v. United States*, 287 U.S. 12 (1932) (The Commission is "not limited to the conditions proposed or favored by the carriers"); *Baltimore & Ohio Railroad v. United States*, 386 U.S. 372, 430 (1967) (J. Brennan, concurring: "the ICC is not the prisoner of the parties' submissions" and must "weigh alternatives and make its choice according to its judgment how to best achieve and advance the goals of the NPT.")

[7] See Footnote 4.

[8] By doing so in this case, however, we specifically do not intend to alter or modify in any way the existing precedent or customary application, of *New York Dock*, *Mendocino Coast* or *Norfolk & Western* conditions in any other case.

transactions until the implementing agreement is reached or the arbitration process has concluded. Any transactions that have already been implemented will not have to be undone pending formulation of the agreement or conclusion of arbitration, but those transactions are to be covered by the agreement or arbitration. We find that these protective conditions, with the adjustments we have made, provide a fair arrangement for the affected rail employees.

The time frame for arbitration is that set forth in Section 4 of Article I of the *Mendocino Coast*, *Norfolk and Western*, and *New York Dock* conditions.

Once either side has requested arbitration, the parties have 5 days to select a neutral referee. If they are unable to agree on a selection within 5 days, then the National Mediation Board shall immediately appoint a referee. A hearing on the dispute must then be commenced within 20 days. Finally, the referee's final binding decision must be rendered within 30 days from the commencement of the hearing.

The arrangement we are imposing in this decision will, therefore, provide either a negotiated implementing agreement or an arbitrated final binding implementing agreement no later than 90 days from the service date of this decision.

BACKGROUND

Under all the notices, D&H, MEC, B&M, and PT lease their rail lines to ST and assign to ST their trackage rights over the lines of other rail carriers.[9] It is now clear that GTI is using the transactions to have ST provide service over the entire GTI system in lieu of the other carriers. While the GTI scheme is not a merger, the transactions, when viewed collectively, nevertheless

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[9] At the early stages of this proceeding the GTI carriers contemplated granting trackage rights to ST over some of their lines. Since that time those trackage rights arrangements have been superseded by leases.

constitute a substantial undertaking that will have an impact on all of the rail employees of the GTI carriers. It is our responsibility as here pertinent and under 49 U.S.C. 11347 to provide for a fair arrangement for the employees affected by the transactions.

These transactions fall under 49 U.S.C. 11343. The GTI carriers are members of the same corporate family, and the Commission has exempted, from the prior approval requirements of 49 U.S.C. 11343, transactions within a corporate family that do not result in adverse changes in service levels, significant operational changes, or a change in the competitive balance with carriers outside the corporate family. 49 CFR 1180.2(d)(3). Instead of filing an application under 49 U.S.C. 11344, rail carriers file under 49 CFR 1180.4(g) a verified notice with the Commission at least one week before the transaction is to be consummated. The GTI carriers filed notices of their transactions, and the exemptions became effective pursuant to the regulations.

All of the MEC transactions and most of the B&M transactions have been implemented. In a decision issued in May 1987, GTI was notified that implementation of these leases was specifically subject to our right to reconsider the necessary level of labor protection. At the request of the labor interests, in decisions served October 26 and December 18, 1987, the carriers were ordered not to implement any D&H transactions and any unimplemented B&M transactions pending resolution of this proceeding.

DISCUSSION AND CONCLUSIONS

1. EMPLOYEE PROTECTION

We find that imposition of appropriate labor protective conditions, rather than ordering revocation, is warranted in this case. Labor argues that the cumulative effect of the series of transactions will be to substitute ST as the operator of the entire GTI system. This, it is argued,

would be the effective equivalent of a consolidation or an acquisition by ST of the other GTI carriers, and, as such, merits *New York Dock* protection for the affected employees.

The labor interests also note that over 2000 employees will have been affected by the time all of the transactions have been implemented. They contend that imposition of the *New York Dock* conditions, which call for (among other things) a 90-day notice period prior to implementation of a transaction, will result in a more orderly transition for the workforce of GTI and ST.

Labor also seeks total revocation of the exemptions under which GTI has filed, claiming that the transactions simply do not meet the criteria of 49 CFR 1180.2(d)(3).

GTI counters that each ST transaction is a typical lease for which *Mendocino Coast* protection is appropriate. In each instance, employees of the lessor carrier (B&M, D&H, MEC, or PT) have stopped or will stop performing work on the leased properties, and employees of the lessee (ST) have taken or will take over those responsibilities. GTI points out that operationally and financially each lease has been designed to stand on its own. In GTI's view, the leases are related only to the extent that they are all meant to further the GTI system goal of providing more efficient service on a more profitable basis.

GTI also argues that there is no need for *New York Dock* protection here because the *Mendocino Coast* 20-day notice period is sufficient. In support of its position, GTI notes that between 1971 and 1977, when rail passenger service was assumed by Amtrak, approximately 20,000 employee positions were affected with only a 20-day notice period before consummation of each transaction.

GTI notes that the substantive benefits and eligibility requirements are identical under both sets of conditions and that the benefits must be afforded retroactively to

the time that an employee is adversely affected. Because employees can be made whole regardless of whether an implementing agreement is reached prior to or subsequent to consummation of a transaction, GTI contends that there is no need for the prior-to-consummation implementing agreement of *New York Dock*, instead of the post-consummation agreement of *Mendocino Coast*.

Upon review of the evidence, we are unable to conclude that the transactions are the equivalent of a merger, consolidation or acquisition of control. Nevertheless, we are persuaded that the impact of these transactions is very close to that of a merger or consolidation. There are, for example, a large number of employees who have been or would be affected by related transactions consummated within a short period of time. The transactions envision three relatively large railroads (and the small PT), operating over an extensive system of track throughout the Northeast, in essence being replaced by ST, a carrier heretofore operating only a few miles of track. (As of early October 1986, ST's operations were confined to Woodland, ME, Voorheesville, NY, Worcester, MA, Springfield, VT, Scotia, NY, and Chicopee, MA.) Together, B&M, MEC, and D&H had a combined workforce of over 2000 employees, whereas, as recently as January 1987, ST had only 50 employees. After these transactions are consummated, there would be no surviving workforces on B&M, MEC, D&H, and PT, while ST will have greatly increased its workforce to meet its new operating responsibilities.

The workforces of B&M, MEC and D&H are aligned along the traditional crafts of the railroad industry. Employee members of the different crafts are represented by various unions and have pay rates and work rules established through collective bargaining with those unions. ST's workforce, on the other hand, consists of one craft, the so-called "railroader." ST's railroaders perform all of the various tasks that on other railroads

are separated along craft lines. ST's railroaders are paid, on the average, less than are the employees of the other GTI carriers. In addition, ST's work rules are more favorable to the carrier than are those of the other carriers. Indeed, a major reason GTI is shifting its operations to ST is to realize the economies afforded by the railroader concept and the ST work rules.[10]

While assembling its workforce, ST has made offers of employment to present and former employees of the other GTI carriers. The record shows that GTI officials have made confusing statements to labor officials and to GTI employees regarding the effect of these offers. GTI has informed some employees that employment offered by ST must be accepted or the employees would forfeit all or some of their protective benefits. They have also been told that, if they accept an ST offer of employment without exercising their seniority rights with their GTI employer, they also forfeit all or some of their benefits.

Under Commission-imposed labor conditions, a dismissed employee is entitled to a dismissal or separation allowance unless he fails without good cause to accept an offer of comparable employment. In the typical lease or trackage rights situation, the offer of employment would come from the railroad for which the employee worked prior to the transaction. In this instance, an

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[10] The labor interests argue that with ST taking over all of the GTI operations, the traditional crafts and unions will be eliminated on the GTI system. They argue that the elimination of craft distinctions and removal of the various unions as representatives of GTI employees (and resulting loss of dues-paying members) will weaken those unions.

GTI contends that declining union membership is not relevant in deciding whether any special circumstances warrant the imposition of greater protection. GTI correctly notes that elimination of various crafts often occurs in connection with transactions of this nature. We note that to the extent there is a representation issue, it is a matter to be resolved by the National Mediation Board under the appropriate provisions of the Railway Labor Act.

employee of the lessor (or assignor of trackage rights), would in the usual case have to accept an offer of comparable employment made by the lessor to work for the lessor, with whom the employee already has an employment relationship. Thus, the lessor's employees would normally have no right to expect an offer from the lessee railroad. Moreover, they would be under no obligation to accept such employment, even if it were offered, since they had neither an employment relationship nor a bargaining relationship with the lessee.

In the typical case of a consolidation or acquisition, two or more railroads may combine their operations, with either a surviving entity conducting all of the combined operations or each carrier operating some portion of the consolidated operations. Where operations will be combined, the previously separate workforces need to be coordinated. Offers of comparable employment normally are made by the surviving operating entity to former employees of both railroads before any offers are made to outside parties. These offers must be accepted (if employees have exercised their seniority and have been dismissed), or the employees lose their protective benefits.

Here, GTI contends that ST is a carrier separate from the other GTI carriers and that ST does not intend to be a party to any implementing agreement or negotiations involving the employees of the other GTI carriers. GTI contends that those employees have no right to or expectation of employment with ST, but, nevertheless, if they are offered employment with ST, they must accept it or lose their benefits from their GTI employer. We find this approach contrary to established practice and we do not approve it.

GTI would treat ST as the typical lessee carrier--as if it were a foreign system with no obligation to offer employment to the work force of the remainder of the GTI family, and no obligation to negotiate over the merging of seniority rosters. But, on the other hand, GTI seeks

to avoid exposure to the payment of dismissal allowances by claiming that an employee who declines comparable employment with ST has forfeited rights under the *Mendocino Coast* protection plan.

There is, in the typical case under *New York Dock*, an obligation to take offers of comparable employment, but those offers are not ripened until an implementing agreement has been established and rights under the agreement can be assessed. Consequently, employees have the protection of a negotiated or arbitrated arrangement establishing seniority and the basis on which the new work would be performed. RLEA correctly notes (Post-Hearing Brief, at 24) that these features of implementing agreements have long been recognized by this agency as crucial to employees.

Although each of the several ST leases may be designed operationally and financially as independent transactions, we cannot ignore the significant impact of the series taken as a whole. Although we do not have a true consolidation here, the transactions represent restructuring of the GTI system with all of its operations to be performed by ST. In the typical consolidation transaction, it is necessary to coordinate work forces of two or more railroads. Here, to the extent that ST has offered employment to many former employees of the other GTI carriers, the outcome is similar in effect to a consolidation.

Thus, we are persuaded that employees affected by the ST transactions should be provided more than the standard protections that accompany lease transactions. While the *Mendocino Coast* protections have proven quite satisfactory for the normal case, it has always been understood that they are minima—that additional protections could be provided in the exceptional case. Because of the system-wide impact of the present arrangement and the substantial impact on numerous rail employees, the

need for an implementing agreement prior to any further reorganization is established.

In order fairly to protect rail employees in these unusual circumstances, we will require an implementing agreement (and binding arbitration, if necessary to achieve that agreement) that includes ST, the surviving operating entity, as a participant, along with B&M, D&H, MEC, and PT, and the employees of ST, B&M, D&H, MEC, and PT. This modification of the usual conditions will provide a basis for the fair selection of a workforce for the surviving entity.

Including ST and the representatives of the UTU on the ST lines as participants will remedy two problems identified by labor. First, inclusion of all concerned will allow recognition and negotiation of seniority more fairly. To date, and particularly with regard to the MEC employees affected by the early leases, the manner in which GTI has proceeded is unacceptable. Secondly, inclusion of all parties simultaneously will permit proper consideration of the extent to which the ST can and should provide for the respected practice that employees be permitted to "follow their jobs." This issue will be complicated because of the need to accommodate employment to the new operational structure on the surviving ST line. However, we are certain that these issues will be more fairly addressed by full-party negotiation or arbitration than they have been to date.

It is further necessary to be clear on the scope of employee rights under the implementing agreement we are requiring. Between the time that ST and GTI first implemented one of their transactions and the date of this decision, numerous employees in the GTI family have been required to make employment choices on what appears to have been unsatisfactory information. RLEA has argued that the "opportunity to know what their employment options are before they are required to exer-

cise (them)" is the "essential difference" for employees between *New York Dock* conditions (the conditions that labor has sought consistently throughout this proceeding) and *Mendocino Coast*. (Post-Hearing Brief, at 28.) We agree with this assessment, and we have decided that the transactions undertaken by GTI cannot be fairly accomplished without respecting this essential difference. Consequently, any implementing plan, agreed to or arrived at through arbitration, shall provide that the employees of the several GTI railroads as of the date of the first such transaction under 49 USC 1180.2(d)(3) shall not be deemed to have forfeited any rights or benefits as a consequence of decisions made prior to the development of such an implementing plan.

In order to cause as little disruption as possible, GTI is ordered not to implement the D&H and unconsummated B&M transactions until an implementing agreement is reached or the arbitration process has run its course. GTI will not in the meantime be required to "undo" any consummated transactions but those transactions are subject to the conditions we are imposing in this proceeding. The implementing agreement will extend to those transactions, and, when an agreement is reached or arbitration is concluded, GTI will have to make whatever adjustment to the consummated transactions the implementing agreement or arbitration award requires. We will review any appeals from arbitration awards associated with arriving at an implementing agreement.

Within this framework, we believe, both labor and management have incentives to negotiate promptly and in good faith. Because we are holding up consummation of certain transactions pending an implementing agreement or an arbitrated result, GTI would pursue a prompt resolution. In order to clarify the status of employees or former employees affected by already consummated transactions, employees and their representatives would also

favor a prompt resolution. These factors also provide bargaining leverage to each side. We agree, for example, with RLEA's statement (Post-Hearing Brief, at 27) that "employees have bargaining leverage flowing from the carriers' desire to consummate as quickly as possible which encourages compromise, and thus an agreement." While RLEA made this statement in the context of arguing for *New York Dock* conditions, the same bargaining pressure would be present under the conditions we impose here.

2. REVOCATION

As previously noted, we decline to revoke the exemption in favor of remedial conditions. Without an exemption from the Commission's authority, the transactions would be subject to prior approval and authorization by the Commission, for leases under 49 U.S.C. 11343(a)(2) and for trackage rights arrangements under 49 U.S.C. 11343(a)(6). This would necessitate the filing by GTI of applications under 49 U.S.C. 11344 and 49 CFR Part 1180. Under 49 U.S.C. 10505, however, the Commission is directed to exempt a transaction from these prior approval requirements when it finds that: (1) application of those requirements is not necessary to carry out the national rail transportation policy set forth at 49 U.S.C. 10101a; and (2) either (a) the transaction is of limited scope, or (b) the Commission's prior approval is not needed to protect shippers from the abuse of market power.

Under our section 10505 exemption authority, we have exempted from our review several classes of transactions governed by section 11343, including the class exemption at issue here, transactions within the same corporate family. *Railroad Consolidation Procedures*, 363 I.C.C. 200 (1980) and 366 I.C.C. 75 (1982). Other section 11343 transactions exempted under section 10505 as a class include acquisition or continuance in control of non-

connecting carriers under certain specified conditions [49 CFR 1180.2(d)(2)] and renewal, or extension in time, of leases [49 CFR 1180.2(d)(4)]. More recently, we have exempted as a class the acquisition and renewal of trackage rights by a rail carrier over lines owned or operated by any other rail carrier or carriers that are based on written agreements, and not filed or sought in responsive applications in rail consolidation proceedings [49 CFR 1180.2(d)(7)]. *Railroad Consolidation Procedures—Trackage Rights Exemption*, 1 I.C.C. 2d 270 (1985), *aff'd sub nom. Illinois Commerce Commission* v. *ICC* No. 86-1386 (D.C. Cir. May 19, 1987).

The labor interests contend that the corporate family class exemption must be revoked with respect to the GTI transactions in order to advance two of the enumerated goals of the national rail transportation policy: encouragement of fair wages and safe and suitable working conditions in the railroad industry [49 U.S.C. 10101a(12)] and operation of transportation facilities and equipment without detriment to public health and safety [49 U.S.C. 10101a(8)]. They argue that these transactions should be subjected to more scrutiny than is required by the class exemption.

The exemption process is intended to reduce the regulatory burden on railroads of undertaking certain types of transactions, and to minimize regulatory delay. The vast majority of cases handled under the various class exemptions are non-controversial and in the public interest. This proceeding raised special, unusual issues that caused us to go far beyond the class exemption procedure. This does not require a finding that the class exemption is inappropriate. We have stated in the past that while class exemptions permit the vast majority of covered transactions to go forward without specific prior approval, we stand ready to consider any necessary modifications to a particular exempted transaction in exceptional circumstances such as those found here.

In this proceeding we thus have required extensive evidentiary presentations and legal argument in order to provide an adequate evidentiary basis for our resolution of the issues. The lengthy record we have developed has allowed us to consider fully the multiple goals of the national rail transportation policy. Given the length and scope of the record, we have given scrutiny equivalent to what would have been provided had the exemption been revoked and GTI required to file a formal application under 49 U.S.C. 11344 or an individual petition for exemption under section 10505.

In the circumstances of this case, revocation of the exemption has not been shown to be necessary in order to encourage fair wages, safe and suitable working conditions. Revocation of the exemption has not been shown to be necessary in order to encourage fair wages and suitable working conditions in the railroad industry. Revocation would require the railroads either to file an application under section 11343 or a petition for exemption under section 10505. It would not, however, automatically change the appropriate type of labor protective conditions for the GTI transactions. Furthermore, the adjustments that we have made here to the protective conditions should encourage fair wages and suitable working conditions. We conclude that the exemption need not and should not be revoked (except to the extent necessary to impose the appropriate labor protective conditions on the transactions).

The labor interests further contend that the GTI transactions do not fit within the corporate family exemption [49 CFR 1180.2(d)(3] because, it is alleged, they fall within the stated exception to use of the exemption. That is, they will result in adverse changes in service levels, significant operational changes, or a change in the competitive balance with carriers outside the corporate family.

GTI claims that the lease and trackage rights transactions will improve service to shippers. From the record in this case, we are unable to determine whether GTI's optimism will be borne out. However, absent labor controversy, the transactions should not adversely affect service levels or cause significant operational change that would do damage to any shipper or to the pre-existing balance of rail competition in the Mid-Atlantic States or New England. Our focus is remedial. Because of the incentives and opportunities provided by the increased labor protection we are imposing in this decision, we believe that labor disputes can be promptly resolved by those who have the most to gain from their resolution—GTI's management and GTI's employees. Under the circumstances and as conditions here, the GTI transactions qualify for the corporate family exemption.

In addition, the labor interests argue that the *New York Dock* conditions are appropriate for these GTI transactions because the transactions are merely steps to further the control benefits attributable to the original control and acquisition of D&H, B&M, and MEC by GTI. The *New York Dock* conditions were imposed in those GTI control and acquisition proceedings. *See Guilford Transp. Industries, Inc.—Control—B&M Corp.*, 366 I.C.C. 294 (1982) (*Guilford—Control—B&M*); and *Guilford Transp. Industries, Inc.—Control—D&H Ry. Co.*, 366 I.C.C. 396 (1982) (*Guilford—Control—D&H*). We conclude that the lease and trackage rights transactions are separate and distinct from the original control transactions as claimed by the GTI carriers.

The Commission approved GTI's control and acquisition of the B&M and D&H (GTI at that time already controlled MEC) in 1982 in *Guilford—Control—B&M* and *Guilford—Control—D&H* subject to the labor protective conditions of *New York Dock*. The labor interests contend that the recent leases and trackage rights arrangements between ST and the other GTI carriers are

actions taken to obtain the benefits of that control authorization. They argue that the leases and trackage rights grants are "transactions" within the meaning of Article I, Section 1(a) of the *New York Dock* conditions and that affected employees are therefore entitled to *New York Dock* protection.

The labor interests further contend that the *New York Dock* protective conditions do not apply merely to proposed coordinations set forth in an applicant's operating plan filed with its control application (under sections 11344 and 11345), but, instead, to "any action taken pursuant to authorization of this Commission on which these provisions have been imposed" (Article 1, Section 1(a), *New York Dock* conditions)]. GTI says that the leases and trackage rights were not even contemplated in 1982 and, of course, were not approved by the Commission at that time. GTI states that these later transactions were formulated more than 5 years after the control applications in order to meet new and changing conditions in the rail transportation market.

We are not persuaded that the ST lease and trackage rights transactions were anticipated or result from the D&H and B&M control transactions. On the contrary, the lease and trackage rights transactions are a wholly new development—one which is actually antithetical to the original idea of control—and stem from intervening events.

We find, therefore, that the recent GTI transactions are not "transactions" as defined in *New York Dock* taken pursuant to the earlier control authorizations, are not part of those control transactions, and are not covered by the *New York Dock* conditions imposed on those authorizations.

While we believe that the circumstances present in this case require that we impose extraordinary labor protection, we conclude that the exemption should stand,

subject to the partial revocation necessary to impose that level of protection. Full revocation is not justified and, in any event, return to the *status quo ante* at this time would risk paralyzing the process of resolving an exceedingly complex series of problems. Partial revocation as ordered here, on the other hand, is consistent with the public interest and will further national transportation goals and policies by simultaneously promoting safe and efficient rail transportation services and fair treatment of employees in the railroad industry.

This action will not significantly affect either the quality of the human environment or energy conservation.

We find:

The appropriate level of employee protection for these intracorporate transactions is that set forth in *Mendocino Coast Ry., Inc.—Lease and Operate,* 354 I.C.C. 732 (1978) and 360 I.C.C. 653 (1980), (with respect to the lease transactions) and *Norfolk and Western Ry. Co.—Trackage Rights—BN,* 354 I.C.C. 605 (1978), as modified in *Mendocino Coast, supra,* 360 I.C.C. 653 (1980) (with respect to the trackage rights transactions), with the following adjustments: (a) the process for formulating an implementing agreement for all of these transactions will include as participants ST, B&M, D&H, MEC, and PT, and the employees of all of these rail carriers; (b) as discussed above, the parties will have 90 days from the service date of this decision to reach an implementing agreement (The parties are at any time after the first 20 days free to submit these issues to arbitration. Arbitration proceedings, if any, are to be guided by the rules in Article 1 Section 4 of the standard conditions.); (c) GTI shall not implement the D&H and unconsummated B&M transactions until the implementing agreement is reached or the arbitration process has concluded.

It is ordered:

1. RLEA's motion to late-file its brief and motion to exceed the 30-page limit are granted.

2. RLEA's motion to supplement and to file executed copies is granted.

3. GTI's motion to strike is denied.

4. Finance Docket Nos. 30925, 30951, and 30966 are included in this proceeding.

5. The exemptions for these transactions are revoked only to the extent necessary to impose the employee protective conditions we have found to be appropriate.

6. This decision is effective February 29, 1988.

By the Commission, Chairman Gradison, Vice Chairman Andre, Commissioners Sterrett, Simmons, and Lamboley, Chairman Gradison, Commissioners Sterrett, Simmons, and Lamboley commented with separate expression.

/s/ Noreta R. McGee
Secretary

(SEAL)

CHAIRMAN GRADISON, commenting:

In ordering increased protection for railroad employees affected by these transactions, the Commission has chosen a course of action which will lead to prompt and equitable resolution of existing disputes. Having considered the shippers' need for high quality service, the carriers' need for efficiency and the employees' need for a fair implementing agreement as required by Commission imposed protective conditions, this agency has directed labor and management to negotiate or to have any continuing disagreements regarding implementation resolved by an arbitrator within 90 days.

Under the arrangement which this Commission was uniquely positioned to impose, Springfield Terminal will have a workforce, employees will have clear choices based on clear protective benefits, and shippers will have service. While this resolution will cost the Guilford system more than it might have originally planned, it is nonetheless in the long term best interests of all parties concerned.

COMMISSIONER STERRETT, commenting:

In my view, the result reached in this decision, given the circumstances presented, will resolve some of the problems that have recently plagued rail service in the Northeast. Nevertheless, in light of the regrettable situation that gave rise to this proceeding, I feel that an additional comment would be appropriate here.

Guilford may have indeed acted within the legal parameters of our regulations. However, it has done so in a manner which has resulted in a great disservice to its employees, its connecting carriers, and, as has become increasingly more evident, the shipping public. Guilford's actions have even jeopardized the effectiveness of the very administrative process it exploited.

During the time that I have served as a Commissioner, this agency had consistently endeavored to fashion rules and processes of administration that maximize the benefits of our rail transportation system to all shippers and minimize the burden of regulation. While advancement of these goals has not been easy or without contention, I am satisfied that the endeavor has resulted in a more efficient and innovative rail industry that is clearly better suited to meet the transportation needs of this country. The fact that the regulated community has most often responded with restraint and intelligence to its new opportunities has been a significant element in allowing the process to go forward.

Unfortunately, deregulation's successes can easily be undone by reckless abuse of privilege and thoughtless opportunism. The manner in which our rules have been misused here is bound to provoke a reaction that is damaging in the long run to the efforts to create a sound, responsive transportation system. But for my concern for the reinvigoration of rail service in the Northeast, I would be tempted to revoke Guilford's newly contrived authorities altogether, as a clear signal to others to avoid its folly. As it stands, however, the Commission's decision holds the best prospect for settlement of the immediate dispute.

COMMISSIONER SIMMONS, commenting:

I am concerned about GTI's violation of the spirit of the class exemption for transactions within a corporate family. I do not believe the majority adequately deals with the possibility that in the future the procedure could be violated in a similar manner. Therefore, I would have reopened the class exemption proceeding on our own motion for revision to ensure that not only the letter but the spirit of the exemption is carried out henceforth.

COMMISSIONER LAMBOLEY, commenting:

Effective dispute resolution in this case requires imposition of protective conditions, the substance of which is derived from virtually identical provisions in *New York Dock*, *Mendocino Coast*, and *Norfolk and Western*,[1] combined with procedures fashioned to provide a remedy appropriate to the circumstances. Since our focus at this

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[1] *New York Dock Ry.—Control—Brooklyn Eastern Dist.* 360 I.C.C. 60 (1979); *Mendocino Coast Ry. Inc.—Lease and Operate* 354 I.C.C. 732 (1976) and 360 I.C.C. 653 (1960); and *Norfolk & Western Ry. Co.—Trackage Rights—BN* 360 I.C.C. 653 (1978).

juncture is necessarily remedial, revocation of exemption could well prove choatic and counter-productive for employees and shippers alike.

However, a cursory review of authority[2] would have demonstrated that the scope of the class exemption expressly did not include the series of transactions which were designed to bypass negotiations, and systematically effect transfer and consolidation of substantial operational activities of several GTI rail subsidiaries into one subsidiary.

In other transactions properly utilizing the intracorporate exemption to effect consolidation of operations, *New York Dock* conditions and procedures are routinely recognized as appropriate and applied without more.[3] Here, the GTI carriers attempted to structure and characterize their transactions to avoid those obligations.

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[2] See 49 CFR 1180.2(d)(3), Ex Parte No. 282 (Sub-No. 3) *Railroad Consolidation Procedures* (I) 363 I.C.C. 200 (1980), revised and modified (II) 366 I.C.C. 75 (1982); Ex Parte No. 282 (Sub-No. 9) *Railroad Consolidation Procedures—Trackage Rights Exemption* 1 I.C.C. 2d 270 (1985).

[3] Ex Parte No. 282 (Sub-No. 3) *Railroad Consolidation Procedures* (II) *supra.* (finding in part that Commission has no authority to exempt transactions from statutory labor protection obligations, and *New York Dock* conditions should be applicable. See also: Finance Docket No. 31191, *Missouri Pac. R.R. Co.—Merger Exemption—The Weatherford Mineral Wells & N.W. R.R. Co.*, notice of exemption served January 15, 1988; Finance Docket No. 31192, *Union Pac. R.R. Co.—Merger Exemption—Oregon Short Line R.R. Co., Oregon-Washington R.R. & Navigation Co.-Des Chutes R.R. Co., Los Angeles & Salt Lake R.R. Co. & Spokane International R.R. Co.*, notice of exemption served January 15, 1988; Finance Docket No. 31193, *Hampton & Branchville R.R. Co., Inc. & Colleton County R.R. Co.—Merger Exemption*, notice of exemption served January 11, 1988; and Finance Docket No. 31201, *Baltimore Belt R.R. Co., et al. and CSX Transportation, Inc.—Merger Exemption*, notice of exemption served January 21, 1988.

This case is instructional as an example of what carrier(s) ought not do. Unfortunately, it was done. Rail employment and services have been adversely impacted. Rights and interests of employees, shippers, and other carriers have been compromised. Hopefully, the remedy here crafted will provide the opportunity to ameliorate and adjust those consequences.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 87-1774

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Plaintiffs, appellants,

v.

GUILFORD TRANSPORTATION INDUSTRIES, INC., *et al.*,
Defendants, appellees.

JUDGMENT

Entered: January 20, 1988

This cause came on to be heard on appeal from the United States District Court for the District of Maine, and was argued by counsel.

Upon consideration whereof, It is now hereby ordered adjudged and decreed as follows: the judgment of the district court is affirmed.

By the Court:

/s/ Francis P. Scigliano
Clerk

[cc: Messrs. Clarke and Moore]

APPENDIX E

Statutes Relied Upon

I. Railway Labor Act, 45 U.S.C. § 151, *et seq.* (Excerpts)

A. Section 2 First

45 U.S.C. § 152 First

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

B. Section 2 Seventh

45 U.S.C. § 152 Seventh

No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act.

C. Section 5 First

45 U.S.C. § 155 First

The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 10 of this Act to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this Act.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 10 of this Act, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

D. Section 6

45 U.S.C. § 156

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended

change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been rquested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

E. Section 7 First

45 U.S.C. § 157 First

Whenever a controversy shall arise between a carrier or carriers and its or their employees which is not settled either in conference between representatives of the parties or by the appropriate adjustment board or through mediation, in the manner provided in the preceding sections, such controversy may, by agreement of the parties to such controversy, be submitted to the arbitration of a board of three (or, if the parties to the controversy so stipulate, of six) persons: Provided, however, That the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this Act or otherwise.

II. Rail Passenger Service Act, 45 U.S.C. § 501 et seq. (Excerpts)

A. Section 405(b)

45 U.S.C. § 565(b)

(b) Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) to such employees under existing collective-bargaining agreements or otherwise; (2) the continuation of collective-bargaining rights; (3) the protection of such individual employees against a worsening of their positions with respect to their employment; (4) assurances of priority of reemployment of employees terminated or laid off; and (5) paid training or retraining programs. Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to section 5(2)(f) of the Interstate Commerce Act. Any contract entered into pursuant to the provisions of this title shall specify the terms and conditions of such protective arrangements. No contract under section 401(a)(1) of this Act between a railroad and the Corporation may be made unless the Secretary of Labor has certified to the Corporation that the labor protective provisions of such contract afford affected employees fair including affected terminal employees, and equitable protection by the railroad.

III. Interstate Commerce Act, 49 U.S.C. § 10101 et seq. (Excerpts)

A. Section 10505

49 U.S.C. § 10505

(a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Interstate

Commerce Commission under this subchapter, the Commission shall exempt a person, class of persons, or a transaction or service when the Commission finds that the application of a provision of this subtitle—

(1) is not necessary to carry out the transportation policy of section 10101a of this title; and

(2) either (A) the transaction or services is of limited scope; or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power.

(b) The Commission may, where appropriate, begin a proceeding under this section on its own initiative or on application by the Secretary of Transportation or an interested party.

(c) The Commission may specify the period of time during which an exemption granted under this section is effective.

(d) The Commission may revoke an exemption, to the extent it specifies, when it finds that application of a provision of this subtitle to the person, class, or transportation is necessary to carry out the transportation policy of section 10101a of this title.

(e) No exemption order issued pursuant to this section shall operate to relieve any rail carrier from an obligation to provide contractual terms for liability and claims which are consistent with the provisions of section 11707 of this title. Nothing in this subsection or section 11707 of this title shall prevent rail carriers from offering alternative terms nor give the Commission the authority to require any specific level of rates or services based upon the provisions of section 11707 of this title.

(f) The Commission may exercise its authority under this section to exempt transportation that is provided by a rail carrier as a part of a continued intermodal movement.

(g) The Commission may not exercise its authority under this section (1) to authorize intermodal ownership that is otherwise prohibited by this title, or (2) to relieve a carrier of its obligation to protect the interests of employees as required by this subtitle.

B. Section 11341(a)

49 U.S.C. § 11341(a)

The authority of the Interstate Commerce Commission under this subchapter is exclusive. A carrier or corporation participating in or resulting from a transaction approved by or exempted by the Commission under this subchapter may carry out the transaction, own and operate property, and exercise control or franchises acquired through the transaction without the approval of a State authority. A carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction. However, if a purchase and sale, a lease, or a corporate consolidation or merger is involved in the transaction, the carrier or corporation may carry out the transaction only with the assent of a majority, or the number required under applicable State law, of the votes of the holders of the capital stock of that corporation entitled to vote. The vote must occur at a regular meeting, or special meeting called for that purpose, of those stockholders and the notice of the meeting must indicate its purpose.

C. Section 11343(a)

49 U.S.C. § 11343(a)

(a) The following transactions involving carriers providing transportation subject to the jurisdiction of the

Interstate Commerce Commission under subchapter I (except a pipeline carrier), II, or III of chapter 105 of this title may be carried out only with the approval and authorization of the Commission:

(1) consolidation or merger of the property or franchises of at least 2 carriers into one corporation for the ownership, management, and operation of the previously separately owned properties.

(2) a purchase, lease, or contract to operate property of another carrier by any number of carriers.

(3) acquisition of control of a carrier by any number of carriers.

(4) acquisition of control of at least 2 carriers by a person that is not a carrier.

(5) acquisition of control of a carrier by a person that is not a carrier but that controls any number of carriers.

(6) acquisition by a rail carrier of trackage rights over, or joint ownership in or joint use of, a railroad line (and terminals incidental to it) owned or operated by another rail carrier.

D. Section 11347

49 U.S.C. § 11347

When a rail carrier is involved in a transaction for which approval is sought under sections 11344 and 11345 or section 11346 of this title, the Interstate Commerce Commission shall require the carrier to provide a fair arrangement at least as protective of the interests of employees who are affected by the transaction as the terms imposed under this section before February 5, 1976, and the terms established under section 565 of title 45. Notwithstanding this subtitle, the arrangements may be made by the rail carrier and the authorized rep-

resentative of its employees. The arrangement and the order approving the transaction must require that the employees of the affected rail carrier will not be in a worse position related to their employment as a result of the transaction during the 4 years following the effective date of the final action of the Commission (or if an employee was employed for a lesser period of time by the carrier before the action became effective, for that lesser period).

IV. Title 28 (Excerpts)

Section 1337(a)

28 U.S.C. § 1337(a)

The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies: Provided, however, That the district courts shall have original jurisdiction of an action brought under section 11707 of title 49, only if the matter in controversy for each receipt or bill of lading exceeds $10,000, exclusive of interest and costs.

APPENDIX F

Railway Labor Executives' Association
Member Organizations

American Railway & Airway Supervisors' Association (Division of TCU);

American Train Dispatchers' Association;

Brotherhood of Locomotive Engineers;

Brotherhood of Maintenance of Way Employes;

Brotherhood of Railroad Signalmen;

Brotherhood of Railway Carmen (Division of TCU);

Hotel Employees and Restaurant Employees International Union;

International Association of Machinists and Aerospace Workers;

International Brotherhood of Boilermakers and Blacksmiths;

International Brotherhood of Electrical Workers;

International Brotherhood of Firemen & Oilers;

International Longshoremen's Association;

National Marine Engineers' Beneficial Association;

Railroad Yardmasters of America (Department of UTU);

Seafarers' International Union of North America;

Sheet Metal Workers' International Association;

Transport Workers Union of America;

Transportation • Communications Union (TCU); and

United Transportation Union.

APPENDIX G

IN THE MATTER OF ARBITRATION BETWEEN

BROTHERHOOD OF LOCOMOTIVE ENGINEERS
AND
UNION PACIFIC RAILROAD COMPANY
MISSOURI PACIFIC RAILROAD COMPANY

DECISION

File:

Finance Docket No. 30,000

Arbitrator:

Jacob Seidenberg, Esquire

Hearing:

December 13, 1984

Appearances:

Brotherhood of Locomotive Engineers
W.H. Hirst—Vice President
E.E. Watson—Vice President

Carriers

R.D. Meredith—Director Labor Ralations—
Union Pacific

R.P. Mitchell—Director Labor Relations—
Missouri Pacific

Post Hearing Briefs Received:

December 29, 1984

Issues:

1). Does Arbitrator have jurisdiction under Section 4, Article I of the ICC imposed New York Dock

Conditions to permit Carriers to transfer work from Missouri Pacific RR to Union Pacific and have transferred work performed under the operating rules and collective bargaining agreement between the Union Pacific RR and the BLE?

2). Does the proposed transfer of work constitute a fair and equitable basis for the selection and assignment of forces under a New York Dock transaction?

Background:

The instant dispute has been precipitated as a result of the Interstate Commerce Commission approving on October 20, 1982 the petitions of the Union Pacific RR, the Missouri Pacific RR and the Western Pacific RR to consolidate and create a new railway system.

In the course of effectuating this new railroad network, the affected Carriers sought to achieve certain "common point consolidations". The parties to this dispute reached agreement on seven common points, but were unable, after six conferences, to reach agreement at the following three common points: Salina, Kansas, McPherson, Kansas; and Beloit, Kansas.

On October 30, 1984, the disputants agreed to submit the matter to arbitration, as provided for by Article I Section 4 of the New York Dock Conditions. These Conditions had been imposed by the Interstate Commerce Commission upon the Carriers as protections for the employees of the three Carriers affected by the consolidation.

The parties selected the Undersigned to hear and decide the dispute.

On October 19, 1983, the ICC issued a Decision under Finance Docket No. 30,000 (Sub-No. 18) in response to petitions filed both by the BLE and UTU relative to the

Commission's plenary jurisdiction over rail consolidation *vis a vis* the requirements of the Railway Labor Act.

The substantive aspects of the dispute stem from the notices served by the Carriers on the Organization pertaining to the selection and assignment of forces at the three common points, and counter proposals thereto. However, before we can deal with the merits, we must review a procedural objection which the Organization has interposed to the Arbitrator's jurisdiction to consider the dispute.

Organization's Position (Procedural)

The Organization notes that Article I, Section 2 of the ICC prescribed New York Dock Conditions states:

> "2. The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes."

The Organization maintains that the Carriers seek to avoid their statutory obligation under the Railway Labor Act, not to unilaterally change rates of pay or terms of working conditions, except in accordance with the provisions of Section 6 of the RLA. The Organization specifically protests the Carriers' efforts to get rid of the Local Agreement of August 10, 1946 in effect on the Missouri Pacific as well as other working conditions. The Organization stresses that at each of the three common points the Carriers do not propose to abandon tracks or facilities. It just seeks to substitute Union Pacific employees and Union Pacific rules for Missouri Pacific employees and Missouri Pacific rules without complying with the RLA requirements.

The Organization asserts the explicit language of Section 2 of Article I, proscribed the Carriers from utilizing Section 4 of Article I as a means to change existing agreements, except by mutual consent. If further asserts that it would be ironic to transmute the New York Dock Conditions from a shield designed to protect employee interests to a sword to deprive employees of their Railway Labor Act protections.

The Organization alludes to several (6) arbitration awards which have found that arbitrators acting under the mandate of Section 4 lack the authority to modify or vitiate existing collective bargaining agreements, in light of the explicit provisions of Section 2. The Organization notes that the Carriers, despite all of the cited awards, did not even request the ICC to overrule these arbitration awards. The Carriers should not be permitted in the instant case to overrule these well reasoned awards.

The Organization notes that the October 19, 1983 ICC clarification has been appealed to the Federal Courts and the appeal is still pending.

Carrier's Position (Procedural)

The Carrier states that since the ICC issued its October 19, 1983 Clarification, the jurisdictional question raised by the Organization is moot and settled. The ICC has held its authority over railroad consolidations is exclusive and plenary, and its approval of a transaction exempts such a transaction from the requirements of all laws including the Railway Labor Act. The Carriers note that the ICC Clarification states:

> "If our approval of a transaction did not include authority for the railroads to make necessary changes in working conditions, subject to payments of specified benefits, our jurisdiction to approve transactions requiring changes in the working con-

ditions of any employees would be substantially nullified. Such a result would be clearly contrary to congressional intent."

The Carrier maintains that the arbitration awards rendered prior to October 19, 1983, must be deemed to have been superceded by the ICC's Clarification Decision. Since the ICC authored the New York Dock Conditions, its holdings as to the intent and purpose of these Conditions must be deemed superior to any arbitral decisions interpreting the Conditions. The Carriers add the ICC Clarification makes it patently clear that no existing working conditions in a collective bargaining agreement barred the execution of the ICC approved Consolidation.

The Carrier further stresses that since the ICC rendered its Clarification Decision there have been two arbitration awards which held there was jurisdiction in an Article I, Section 4 arbitration proceeding to consider changes in existing collective bargaining agreements.

The Carrier states on the basis of the present record there can be no doubt that this Arbitrator, acting under Section 4, has the jurisdiction and authority to approve the transfer of work from the Missouri Pacific to the Union Pacific and place the transferred work under the operating rules and collective bargaining agreements of the Union Pacific.

Findings: (Procedural)

On the basis of the record before us we conclude that we now have jurisdiction to consider the dispute involving the allocation and assignment of forces through implementing agreements drafted pursuant to New York Dock Conditions, even though these implementing agreements may result in the assigned forces operating under a different set of operating rules and different labor agreement than the ones under which they formerly functioned.

We find that, despite the weight of arbitral authority that was formerly in effect prior to the ICC October 19, 1983 Clarification Decision, those arbitration awards must now yield to the findings of the Clarification Decision, i.e., that in effecting railroad consolidations the Commission's jurisdiction is plenary and that an arbitrator functioning under Article I, Section 4, of the labor protective conditions, is not limited or restricted by the provisions of any laws, including the Railway Labor Act, and that the arbitration provisions of the New York Dock Conditions are the exclusive procedures for resolving disputes arising under the Consolidation. We find that the interpretation and application of the Commission as to the scope of its prescribed labor conditions in the instant case, has to be given greater weight than an arbitration award also pertaining to the scope of these labor protective conditions.

When we turn to the substantive aspects of the dispute dealing with the three common points, there are three separate and discrete matters which will be treated in considering the proposed implementing agreements.

Salina, Kansas

This point is currently served by both the UP and MP. Both Carriers serve it by freight assignments. The UP also serves it by switch engine assignments, and the MP by a traveling switch engine.

The Carriers now propose to service Salina by a single UP traveling road switcher which will operate within a 50 miles area of Salina under the UP's operating and schedule rules. The MP traveling switcher will be abolished.

The Organization proposes that the Road Switcher shall be operated by MP employees and it will not perform any switching within the switching limits of Salina.

The Carrier also sets forth how road operations will be handled into and out of Salina and off the MP's Salina Division. These proposals are to have UP crews handle traffice routed via UP while MP crews will handle traffic routed via the MP. Employees adversely affected will receive the protection of the New York Dock Conditions.

The Organization stresses that MP engineers will only be able to exercise their seniority on their own seniority district. If they transfer to another seniority district, they would be listed after the most junior employee in that district. The Organization stresses that since the New York Dock Conditions now offer maximum protection for only six years, this does not effectively afford any meaningful protection to younger employees. It urges the work should be prorated on the basis of engine hours or road miles.

Findings:

After reviewing the detailed proposal contained in the draft implementing agreements of the parties attached to their respective Submissions, we conclude that the Carriers Implementing Agreement (attachment No. 1) with its addenda, more effectively achieves the consolidation and coordination of the operations at Salina. We are not at liberty to overlook that the ICC approved the consolidation under the common control of the Union Pacific Railway System. Accordingly, we find that Carriers' Attachment No. 1, dated September 18, 1984, constitutes the appropriate arrangement for the Salina operations and it is to be the implementing agreement for the Salina operation.

McPherson-El Dorado

McPherson is serviced by both the UP and MP. The UP services McPherson by a local freight assignment operating out of Salina while the MP services it by a local freight assignment operating out of El Dorado. Salina is 35.4 miles from McPherson while El Dorado is 61.7 miles from McPherson.

The Carriers propose to serve McPherson by combining both local freight assignments into a single local to be governed by UP schedule and operating rules. The UP would man the operation for five months and the MP for seven months. The Organization's counter proposal is to apportion the work—36% to UP and 64% to the MP. The Carriers propose Salina to be the home terminal, and the Organization counter proposes that Salina be the home terminal, when the UP engineers are manning the assignment and El Dorado will be the home terminal when MP engineers are protecting the work. The Organization further proposes that when MP engineers operate their alloted proration they will operate under MP rules and MP schedule provisions covering rates of pay and working conditions.

Findings:

We find that the objectives of the coordination and consolidation would be facilitated by the Carriers' proposals as set forth in their Attachment No. 2 attached to Carriers' Submission, with one exception, namely, that when the MP engineers operate the local frieght assignment their home terminal should be El Dorado rather than Salina. The great bulk of MP engineers live in the vicinity of El Dorado and there is no persuasive reason why these engineers should travel approximately 90 miles to work that assignment. However, we find that in the interest of uniformity and consistency of operations that the assignment should operate under UP rules rather than shift back and forth periodically between MP and UP.

Accordingly, we find that Carriers' Attachment No. 2 with its Attachments set forth in its Submission, except as herein amended, shall constitute the implementing agreement to handle the UP and MP traffic between Salina and El Dorado.

Beloit

Beloit is serviced both by UP and MP. The UP services it with local freight assignments operating out of Salina while the MP services it with a local assignment operating out of Concordia. In addition the MP operates several local freight assignments operating west of Frankfort such as:

Atchison-Concordia Local
Concordia-Stockton Local
Down-Lenora Local

The Carriers propose to abolish these listed MP operated Local Assignments and serve Beloit with a consolidated operation to be operated by MP crews because most of the employees living near Beloit are MP employees. The consolidated assignment shall operate, however, under UP rules and schedule provisions.

The Organization contends there is no valid basis to compel MP employees to operate UP rules. The MP employees should be allowed their own rules, rates of pay and working conditions when they function under their allocated proration.

Findings:

We find the allocation of work of Beloit as proposed by the Carriers is fair and reasonable and therefore the description of work set forth in Attachment No. 3, attached to Carriers' Submission, should be governed by the Carriers' proposed implementing agreement.

Accordingly, Carriers' Attachment No. 3 with its attachments shall constitute the implementing agreement to handle operations at Beloit, including the designated territory listed in aforesaid Attachment.

In summary we are aware that any consolidation of rail properties disturbs the status quo and is unsettling to the affected Organization and employees. However, the

Interstate Commerce Commission held that the Consolidation here in issue, with the prescribed labor conditions, is consistent with the public interest (366 ICC 619), and it must be accepted disturbing as it may be, even to the extent of doing away with the MP August 10, 1946 Local Agreement. We find that the Carriers have sought to select and assign the forces, in a fair and reasonable manner, and still achieve the efficiency and benefits which were the prime motivations for seeking the Consolidation. We find that conducting all three common point operations under the UP operating rules and schedule rules are not inconsistent with these objectives, since the UP has common control of the consolidation.

We conclude that the approved proposals, as amended, covering the three common points are an appropriate method for the selection and assignment of forces, and should be effected by the prescribed implementing agreements.

Decision:

Pursuant to Article I, Section 4 of the New York Dock Conditions, we find that the implementing agreement set forth in Carriers' Attachment No. 1 shall be the method for selecting and assigning the forces for the Salina operation.

We find further that implementing agreement, as amended, set forth in Carriers' Attachment No. 2, shall be the method for selecting and assigning the forces for the McPherson-El Dorado operation.

We also find that the implementing agreement set forth in Carriers' Attachment No. 3 shall be the method for selecting and assigning the forces in the Beloit operations.

/s/ Jacob Seidenberg
JACOB SEIDENBERG
Arbitrator

January 17, 1985.

Supreme Court, U.S.
FILED
JUN 24 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1911

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Petitioners,

v.

GUILFORD TRANSPORTATION INDUSTRIES, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

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June 24, 1988

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether the immunity provided by § 11341(a) of the Interstate Commerce Act from "all other law * * * as necessary to let [a party] carry out" a transaction subject to ICC jurisdiction under § 11343 of the Act includes Railway Labor Act requirements that would prevent a carrier from carrying out such a transaction as authorized by the ICC?

2. Whether, if parties to such transactions are immune under § 11341(a) from inconsistent Railway Labor Act obligations, that immunity is lost when the ICC employs expedited approval procedures under § 10505, even though under § 10505(g) the ICC's mandatory duty to impose labor protective conditions on its approval of § 11343 transactions is unaffected by use of the § 10505 procedure?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1911

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Petitioners,

v.

GUILFORD TRANSPORTATION INDUSTRIES, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents Guilford Transportation Industries, Inc., Boston & Maine Corporation ("B&M"), Maine Central Railroad Company ("MEC"), Portland Terminal Company ("PT"), and Springfield Terminal Railway Company ("ST")[1] respectfully request that the petition for writ of certiorari be denied.[2]

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[1] Guilford Transportation Industries, Inc. is a private holding company; respondents B&M, MEC, PT, and ST are wholly-owned subsidiaries of Guilford. Respondents' subsidiaries and affiliates within the meaning of Rule 28.1 are Albany Port Railroad, Albany & Vermont Railway Company, Guilford Aviation Corporation, Guilford Motor Express, Inc., Hudson River Estates, Inc., Northern Railroad, Railstar Control Technology, Inc., Saratoga and Schenectady Railroad Corporation, and Vermont and Massachusetts Railroad Company.

[2] On June 20, 1988, Respondent Delaware & Hudson Railway Company ("D&H") filed a petition for reorganization under Chapter 11

STATEMENT OF THE CASE

This case arises from one of several attempts by petitioners Railway Labor Executives' Association and its member labor unions (hereafter collectively "RLEA"), on behalf of certain employees of respondents B&M, D&H, MEC, and PT, to thwart the implementation of leases of rail lines from these railroads to their corporate affiliate, ST, as approved by the Interstate Commerce Commission ("ICC"). Such transactions are subject to ICC jurisdiction under § 11343 of the Interstate Commerce Act, and the leases here were authorized by the Commission subject to labor protective conditions for affected employees prescribed by the Commission under § 11347 of the Act.

Section 11343 provides that "a purchase, lease, or contract to operate property of another carrier by any number of carriers" may "be carried out only with the approval and authorization of the Commission." 49 U.S.C. § 11343(a)(2). The statutory procedures for obtaining prior Commission review and approval of § 11343 transactions are set forth in §§ 11344 and 11345 of the Act. These are detailed and time-consuming, calling for notice to state governors, potential competitors and other interested parties, and public hearings in many cases. 49 U.S.C. §§ 11344(a); 11345(c). The ICC has authority under § 10505 of the Act to exempt § 11343 transactions, either on an individual or class basis, from these statutory prior review requirements, although when it does so it retains jurisdiction to subject an exempted transaction to detailed after-the-fact scrutiny either on its own

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of the Bankruptcy Code, 11 U.S.C. § 1161 *et seq.*, in the United States Bankruptcy Court for the District of Delaware, and this brief is not filed in its behalf. Although §§ 362(a)(1) and (3) of the Code automatically stay these proceedings against D&H, they do not preclude this Court from denying the petition as against the other respondents; the automatic bankruptcy stay does not apply to non-bankrupt co-defendants. See, *e.g.*, *Teachers Ins. Annuity Ass'n* v. *Butler*, 803 F.2d 61, 65 (2d Cir. 1986), and cases cited therein.

motion or on a petition from an interested party, and may revoke the exemption if that is required by some policy of the Act. 49 U.S.C. § 10505(d).

The ICC lacks the power under § 10505, however, to exempt transactions subject to § 11343 from employee protection requirements applicable to authorization of such transactions. Section 10505(g)(2) provides that the Commission may not "relieve a carrier of its obligation to protect the interests of employees" under other applicable provisions of the Act. Such protection is required as a condition of approval of § 11343 transactions by § 11347 of the Act, under which the Commission must impose employee protection conditions upon the rail carriers participating in any such transaction.[3]

In this case, because both ST and the lessor railroads are carriers under the Interstate Commerce Act, "approval and authorization" of the leases was required under § 11343. The ICC, however, has exempted most transactions "within a corporate family" from the statutory prior review requirements of §§ 11344 and 11345. Instead, it has authorized consummation of these trans-

[3] Section 11347 provides, in pertinent part:

> "When a rail carrier is involved in a transaction for which approval is sought under sections 11344 and 11345 or section 11346 of this title, the Interstate Commerce Commission shall require the carrier to provide a fair arrangement at least as protective of the interests of employees who are affected by the transaction as the terms imposed under this section before February 5, 1976, and the terms established under section 405 of the Rail Passenger Service Act (45 U.S.C. 565). * * * The arrangement and order approving the transaction must require that the employees of the affected rail carrier will not be in a worse position related to their employment as a result of the transaction during the 4 years following the effective date of the final action of the Commission (or if an employee was employed for a lesser period of time by the carrier before the action became effective for that lesser period.)"

In implementing this section the ICC has formulated differing sets of labor protections for the various types of § 11343 transac-

actions seven days after the filing of notice to the Commission specifying the appropriate level of labor protection required by Commission decisions for affected employees. 49 C.F.R. §§ 1180.2(d)(3), 1180.4(g)(1). Such transactions remain subject to retroactive ICC review to ensure that the stipulated protection meets statutory requirements, however, upon petition by interested parties. 49 U.S.C. § 10505(d). Beginning in October 1986, the Guilford railroads invoked this class exemption to obtain ICC approval of the leases to ST, specifying in their notices that the so-called *Mendocino* protections generally applicable to leases (see n.3 *supra*) would be provided. 51 Fed. Reg. 42,143 (November 21, 1986); see also J.A. 89-129.[4]

Beginning in October 1986, RLEA and certain of its member unions filed a series of petitions with the ICC seeking imposition of the so-called *New York Dock* conditions on the ST leases, instead of the *Mendocino* condi-

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tions. These conditions all require that carriers negotiate with their employees' representatives for an agreement to implement work-force changes, that this issue be submitted for binding arbitration if no implementing agreement can be reached within a specified period, and that employees who are dismissed or displaced because of a transaction receive their pre-dismissal or pre-displacement wages for up to six years, among other benefits. See *New York Dock Ry.—Control—Brooklyn Eastern District Terminal*, 360 I.C.C. 60 (1979) (conditions for rail mergers and acquisitions), *aff'd sub nom. New York Dock Ry.* v. *United States*, 609 F.2d 83 (2d Cir. 1979); *Mendocino Coast Ry.—Lease & Operate—California Western R.R.*, 354 I.C.C. 732 (1978) (conditions for rail leases), *modified*, 360 I.C.C. 653 (1980), *aff'd sub nom. RLEA* v. *United States*, 675 F.2d 1248 (D.C. Cir. 1982); *Norfolk & W. Ry.—Trackage Rights—Burlington N.*, 354 I.C.C. 605 (1978) (conditions for trackage rights transactions), *modified*, 360 I.C.C. 653 (1980), *aff'd sub nom. RLEA* v. *United States*, 576 F.2d 1248 (D.C. Cir. 1982).

[4] "J.A." citations refer to the parties' Joint Appendix filed in this case with the United States Court of Appeals for the First Circuit. "Pet. App." citations refer to the Appendices to the Petition for Certiorari and to RLEA's Supplemental Brief ("Supp. Br."). "Opp. App." citations refer to the Appendix to this Brief in Opposition.

tions, contrary to the ICC's usual practice in lease transactions.[5] In several of the petitions RLEA also asked the ICC to stay consummation of the leases pending determination of the appropriate level of labor protection (J.A. 131), and ultimately RLEA asked the ICC to revoke its authorization of the leases (Pet. at 9 n.9.)

On January 28, 1987, while the ICC proceedings on the union petitions were pending, RLEA and its member unions commenced this action in the United States District Court for the District of Maine, asking the court to order imposition of *New York Dock* conditions, rather than *Mendocino* conditions.[6] RLEA also sought to enjoin consummation of the leases under the Railway Labor Act. According to RLEA "the sole purpose" of these transactions was to "avoid[] existing [collective bargaining] agreements and practices which governed" the working conditions on the lessor carriers, by requiring employees of these carriers to "accept jobs with ST" and to work under the ST's labor agreement. RLEA therefore claimed that the lessor carriers were obliged to exhaust the Railway Labor Act's "major dispute" procedures for collective bargaining over proposals for relief from their

[5] The ICC applies *Mendocino* conditions to leases, *New York Dock* conditions to mergers. See n.3 *supra*. The sole relevant difference between the two sets of conditions is that under *New York Dock*, the carrier is required to negotiate or arbitrate an implementing agreement before consummating the transaction; under *Mendocino*, the carrier may consummate after 20 days of negotiations, even if no implementing agreement has yet been reached, and when the required implementing agreement is later established by negotiation or arbitration it is applied retroactively. Compare *New York Dock*, *supra*, 360 I.C.C. at 85, *with Mendocino*, *supra*, 360 I.C.C. at 663.

[6] On January 30, 1987, the district court *sua sponte* dismissed RLEA's Interstate Commerce Act claim for *New York Dock* protections, holding that the appropriate level of labor protection was a matter for the ICC to determine on RLEA's pending petitions (J.A. 65.) In its final judgment, the district court refused RLEA's motion to reinstate that claim (Pet. App. 6a-13a.) RLEA did not appeal this part of the district court's judgment.

collective bargaining agreements before implementing the leases and to maintain the "status quo" for "rates of pay, rules, and working conditions" in the meantime; RLEA claimed that the leases must be enjoined to preserve that status quo. Complaint ¶¶ 13, 15, 18, 28, 32, and Prayer.

In May 1987, the ICC announced that it would conduct a detailed examination of all the pending ST lease cases and "the impact of the transactions on employees." *Delaware & Hudson Ry. Co.—Lease & Trackage Rights Exemption—Springfield Terminal Ry. Co. et al.*, Finance Docket No. 30965 (served May 18, 1987) (J.A. 130). It declined at that time, however, to stay the leases pending resolution of the labor protection issue. *Id.*

On June 19, RLEA went back to the district court, seeking a preliminary injunction against the leases under the Railway Labor Act. Respondents moved to dismiss RLEA's Railway Labor Act claim. On July 27, 1987, the district court issued a final judgment dismissing the Railway Labor Act claim for lack of subject matter jurisdiction. The court relied on § 11341(a) of the Interstate Commerce Act, which provides that the ICC's authority over § 11343 transactions is "exclusive," and that a carrier party to such a transaction approved by the ICC "is exempt from the antitrust laws and from all other law * * * as necessary to let that person carry out the transaction * * *." The court held that its judgment in that regard was controlled by *Brotherhood of Loc. Engineers* v. *Boston & Maine Corp.*, 788 F.2d 794 (1st Cir. 1986), where the First Circuit had held that § 11341(a) preempted application of Railway Labor Act major dispute procedures to a § 11343 lease that the ICC had approved by an exemption under § 10505 (Pet. App. 14a-16a.)

RLEA appealed that ruling to the First Circuit. In an unpublished *per curiam* order entered January 20,

1988, the court of appeals "summarily affirm[ed] the district court's dismissal of this action on the basis of the panel opinion in *Brotherhood of Locomotive Engineers* v. *Boston & Maine Corp.*," *supra*, and found no basis for referring the appeal to the full court so that it might consider overruling its 1986 precedent, as RLEA had asked (Pet. App. 2a.)

On February 25, 1988, the ICC issued its ruling on the RLEA petitions for increased labor protection and to revoke the lease authorizations. It refused to order revocation of the lease authorizations.[7] It held, however, that "extraordinary labor protective conditions" were warranted "[b]ecause of the system-wide impact of the [lease] arrangement and the substantial impact on numerous rail employees * * *" (Pet. App. 23a, 30a-31a.) The ICC therefore ordered the carriers and the unions to reach implementing agreements for all of the leases or to establish an implementing arrangement by arbitration before any additional leases are consummated. *Id.*

The parties were unable to negotiate an implementing agreement, and the dispute was submitted to arbitration in accordance with the ICC order. On June 12, 1988, the arbitrator issued his award, holding that ST must select employees to perform work on the leased lines in accordance with the lessors' seniority rosters and rules, that "ST, in operating the leased lines, facilities and properties," shall abide by the "applicable collective bargaining agreement[s]" of the lessors, and that "[a]ll B&M, D&H, MEC, PT, and ST employees shall be made-whole for any loss of earnings suffered or extraordinary work-related expenses incurred during the period from

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[7] RLEA has asked the ICC to reconsider the demand for revocation, on the ground that the Commission failed in authorizing the leases to "consider the impact of its rulings" on "employees' Railway Labor Act and contractual rights." (Pet. at 20 n.17, & n.9.)

which first adversely affected by a lease until the effective date of this implementing arrangement" (Opp. App. 3a § 1, 4a §3, 7a § 7.) The carriers plan to appeal that award to the ICC.

INTRODUCTION AND SUMMARY OF ARGUMENT

RLEA has attempted to present this case as the "best vehicle available today to resolve * * * crucial issues" as to which the circuits are allegedly in conflict in other pending cases arising from other exempted rail line dispositions (Pet. at 25, 16-17).[8] But the questions presented here—(1) whether § 11341(a) preempts the Railway Labor Act in § 11343 transactions subject to mandatory labor protection under § 11347, and if so, (2) whether § 11343 transactions authorized through § 10505 exemptions rather than through detailed §§ 11344 and 11345 notice and hearing procedures are entitled to that § 11341(a) immunity—are entirely different from the questions presented in the other cases RLEA wishes to have this one substituted for. Those cases all arise under § 10901 of the Interstate Commerce Act, rather than § 11343, and thus are subject to neither § 11341(a) immunity nor mandatory labor protection under § 11347; indeed, the ICC generally refuses to provide labor protection in § 10901 transactions.[9] While these differences have indeed led to a conflict among the circuits on the question whether the Railway Labor Act is preempted in

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[8] See also Brief of Respondent In Response to The Petition, at 2 n.2, On Petition for Certiorari to the United States Court of Appeals for the Third Circuit, *Pittsburgh & Lake Erie Railroad Company* v. *Railway Labor Executives' Association*, Supreme Court No. 87-1589.

[9] See *Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901*, 1 I.C.C. 2d 810 (1985), *aff'd mem. sub nom. Illinois Commerce Comm'n* v. *ICC*, 817 F.2d 145 (D.C. Cir. 1987).

§ 10901 transactions[10], this case does not present that question and cannot serve as a vehicle to resolve that conflict.

Nor does this case warrant review on its own merits: (1) It presents no issue that warrants review, because the decision below is clearly required by the plain terms of §§ 11341(a), 11347, and 10505(g). (2) There is no conflict among the circuits on the questions presented here; the decisions of the courts of appeals all support it. (3) The decision below is consistent with and indeed is mandated by applicable decisions of this Court. (4) And, even if the questions presented here were substantial, the unique facts of this case, including the ICC's imposition of extraordinary labor protections and the recent arbitration award which if upheld will moot the case, make this case unsuitable for review by this Court. For each of these reasons certiorari should be denied.

ARGUMENT

I. The Decision Below Is Plainly Correct On The Face Of The Statute.

The petition presents two questions: (1) whether the immunity under § 11341(a) from "all other laws" that would prevent the carrying out of a transaction subject to ICC jurisdiction under § 11343 includes inconsistent Railway Labor Act requirements (the § 11341(a) issue), and (2) if it does, whether that immunity is lost because the leases here were authorized by a § 10505 exemption (the § 10505 issue). The answers below—yes, and no, respectively—are plainly correct on the face of the Interstate Commerce Act, and thus present no debatable issue warranting review by this Court.

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[10] Compare *RLEA* v. *Chicago & N.W. Transp. Co.*, No. 87-5071 (8th Cir. May 31, 1988), *petition for certiorari pending*, S. Ct. No. 87-2049, *with RLEA* v. *Pittsburgh & Lake Erie R.R.*, 845 F.2d 420 (3d Cir. 1988), *petition for certiorari pending*, S. Ct. No. 87-1888.

A. *Section 11341(a).* In this case, the ICC authorized the carrying out of the leases seven days after notice to the Commission and refused later to stay the leases or order them rescinded. RLEA claims nevertheless that under the Railway Labor Act it is entitled to an injunction to stop the carriers from carrying out the leases pending exhaustion of the "almost interminable" [11] major dispute procedures under that Act, leaving the unions free to strike to stop the transactions thereafter, and that these supposed Railway Labor Act requirements override the ICC authorization. Under § 11341(a) of the Interstate Commerce Act, however, a person participating in a transaction requiring ICC authorization under § 11343 is "exempt from the antitrust laws and all other law * * * as necessary to let that person carry out the transaction * * *." 49 U.S.C. § 11341(a). Thus the courts below were plainly correct in rejecting RLEA's contention. It cannot sensibly be asserted that preemption of Railway Labor Act requirements that would *prevent* the carriers from carrying out transactions as authorized by the ICC is not "necessary to let [the carriers] carry out the transaction[s]." 49 U.S.C. § 11341(a).

B. *Section 10505.* RLEA contends that the ST leases nevertheless lost any immunity under § 11341(a) because they were authorized, procedurally, by § 10505 exemptions. That is plainly incorrect, because under § 11347 the ICC must impose labor protective conditions on its approval of transactions subject to ICC jurisdiction under § 11343; and under § 10505(g) that approval requirement is unaffected by the ICC's use of its § 10505 power to exempt such transactions from other statutory conditions and procedures for approval: "The Commission may not exercise its authority under this section to * * * relieve a carrier of its obligation to protect its

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[11] *Shore Line* v. *Transportation Union*, 396 U.S. 142, 149 (1969).

employees as required by this subtitle," *i.e.*, by § 11347, *inter alia*.[12] 49 U.S.C. § 10505(g)(2). In short, to the extent that a § 11343 transaction affects employees, it must be approved in an order under § 11347, and thus must be "approved" within the meaning of § 11341(a)—even if it is otherwise exempted from the Act's approval requirements.

II. There Is No Conflict Among The Circuits Or With Decisions Of This Court.

A. *Section 11341(a).* 1. In an unbroken line of cases going back more than twenty-five years, the courts of appeals have held that where the Railway Labor Act conflicts with implementation of a transaction authorized by the ICC under § 11343 (or its predecessor, former § 5(2)), that Act is preempted by § 11341(a) of the Interstate Commerce Act (or its predecessor, former § 5(11)).[13] Contrary to RLEA's assertion that until recently no court ever found "that there was in fact an irreconcilable conflict between those two Acts of Congress" (Pet. at 14), this rule is based on the courts' long-standing recognition that there is an inherent conflict

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[12] "This subtitle" means the Interstate Commerce Act, 49 U.S.C. subtitle IV.

[13] *United Transp. Union* v. *Norfolk & W. Ry.*, 822 F.2d 1114, 1122 (D.C. Cir. 1987); *Missouri Pacific R.R.* v. *United Transp. Union*, 782 F.2d 107, 111 (8th Cir. 1986); *Burlington Northern, Inc.* v. *American Ry. Supervisors Ass'n*, 503 F.2d 58, 62-63 (7th Cir. 1974); *Bundy* v. *Penn Central Co.*, 455 F.2d 277, 279-80 (6th Cir. 1972); *Nemitz* v. *Norfolk & W. Ry.*, 436 F.2d 841, 845 (6th Cir.), *aff'd on other grounds*, 404 U.S. 37 (1971); *Brotherhood of Loc. Engineers* v. *Chicago & N.W. Ry.*, 314 F.2d 424, 432 (8th Cir. 1963); *Texas & N.O. Ry.* v. *Brotherhood of R.R. Trainmen*, 307 F.2d 151, 161-62 (5th Cir. 1962). See also *ICC* v. *Brotherhood of Loc. Engineers*, 107 S. Ct. 2360, 2370 (1987) (Stevens, J., concurring).

Former §§ 5(2) and 5(11) were recodified "without substantive change" in pertinent part as §§ 11343 and 11347, and 11341(a), respectively, in 1978. See Pub. L. No. 95-473, § 3(a), 92 Stat. 1466 (1978).

between the Railway Labor Act's major dispute procedures, which RLEA seeks to invoke, and the Interstate Commerce Act's provisions giving the ICC exclusive jurisdiction to determine whether rail transactions under § 11343 should go forward and to impose labor protection for employees affected by such transactions.

The Railway Labor Act's major dispute procedures "leave the parties wholly free, at their own will, to agree or not agree." *Elgin J. & E. R. Co.* v. *Burley*, 325 U.S. 711, 725 (1945).[14] The procedures "are purposely long and drawn out," and the parties are prohibited from making unilateral changes in working conditions pending their exhaustion, "based on the hope that reason and practical considerations will in time provide an agreement that resolves the dispute." *Railway Clerks* v. *Florida E.C. Ry.*, 384 U.S. 238, 246 (1966); see *Trainmen* v. *Terminal Co.*, 394 U.S. 369, 378 (1969). "But compulsions go only to insure that those procedures are exhausted before resort can be had to self-help. No authority is empowered to decide the dispute and no such power is intended, unless the parties themselves agree to arbitration." *Elgin, J. & E. Ry., supra*, 325 U.S. at 725; see 45 U.S.C. § 155 First. Thus, upon exhaustion of the Act's procedures carriers are free to unilaterally implement changes they wish to make, but the unions are likewise free to resort to strikes and nationwide secondary picketing to block such changes. *Florida E.C. Ry., supra*, 384 U.S. at 244; *Burlington Northern R.R.* v. *Brotherhood of Maintenance of Way Employes*, 107 S. Ct. 1841 (1987).

As the Sixth Circuit recognized in 1971 in *Nemitz* v. *Norfolk & W. Ry., supra*, these major dispute procedures are wholly incompatible with the Interstate Commerce Act's vesting of "exclusive" jurisdiction in the Commis-

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[14] See also *Chicago & N.W. R. Co.* v. *Transportation Union*, 402 U.S. 570, 579 n.11 (1971).

sion to decide whether rail transactions should be permitted to go forward: "Since, under the Railway Labor Act, employees cannot be compelled to accept or arbitrate new working rules or conditions, the application of the Railway Labor Act to situations such as that presented here * * * would threaten to prevent many [ICC-approved transactions under former § 5(2)], and, therefore, should not be applied." 436 F.2d at 845.

The Eighth Circuit reached the same conclusion in *Brotherhood of Loc. Engineers* v. *Chicago & N.W. Ry.*, *supra*, where the union sought to avoid mandatory arbitration under an ICC labor protection order and instead to proceed under the Railway Labor Act's major dispute procedures, under which the union would have been free to reject arbitration and instead resort to self-help. 314 F.2d at 427-28. Contrary to RLEA's mistaken assertion that the court in that case "noted that there was no conflict between the two Acts" (Pet. at 15 n.12), the court stated that "under the Railway Labor Act [major dispute] provisions, it is possible for either party to completely block any change in working conditions by refusing to arbitrate. * * * [T]he Railway Labor Act, if it applied, would threaten to prevent many" ICC-approved transactions, and thus to hold it applicable "would be to disregard the plain language of § 5(11) * * *." 314 F.2d at 431.

The more recent preemption decisions that RLEA characterizes as a dramatic departure from formerly settled law employ exactly the same analysis as the earlier decisions. For example, in *Missouri Pacific*, *supra*, the Eighth Circuit recognized that allowing unions to strike under the Railway Labor Act over a § 11343 transaction would effectively give them "carte blanche authority * * * to block" transactions approved by the ICC, a result that Congress sought to avoid by vesting the ICC with authority under § 11347 to "resolve [labor] disputes during the approval proceedings." 787 F.2d at 112.

2. The holding below that § 11341(a) supersedes inconsistent Railway Labor Act requirements likewise conforms to decisions of this Court. In particular, in *Norfolk & Western R. Co.* v. *Nemitz*, 404 U.S. 37 (1971), this Court held that the labor protection terms of the Commission's authorization of a transaction approved under the predecessor to §§ 11343 and 11347 were not subject to alteration under the Railway Labor Act. This Court has recognized since 1939 that the Commission's power to impose labor protective conditions on transactions between carriers, now codified in § 11347 of the Act, is "an essential aid to the maintenance" of the interstate rail system "uninterrupted by labor disputes * * *." *United States* v. *Lowden*, 308 U.S. 225, 235-36 (1939); see *Railway Labor Ass'n* v. *United States*, 339 U.S. 142 (1950); *Maintenance Employes* v. *United States*, 366 U.S. 169 (1961).[15]

3. Neither *McLean Trucking Co.* v. *United States*, 321 U.S. 67 (1944), nor the concurring opinion of Justice Stevens in *ICC* v. *Brotherhood of Loc. Engineers*, *supra*, on which RLEA relies (Pet. at 18-20), is inconsistent with the decision below.

To be sure, as Justice Stevens pointed out, "Any tribunal that is faced with a claim that a party is violating some 'other law'" in connection with a § 11343 transaction "has the responsibility of determining whether an exemption is 'necessary to let that person carry out the transaction * * *.'" 107 S. Ct. at 2377 n.13. But to do that, a court need look only to "the scope of the approved transaction." *Id.* at 2376. It would be nonsensical

[15] RLEA asserts that in granting certiorari in *ICC* v. *Brotherhood of Loc. Engineers*, *supra*, this Court "attempted" to determine as between the Interstate Commerce Act and the Railway Labor Act "which statute prevails" (Pet. at 18), but the only question under § 11341(a) presented in that case was whether that provision is self-executing or whether the ICC is required to make specific findings in each case as to the necessity of preemption of the Railway Labor Act. See 54 U.S.L.W. 3429 (Dec. 24, 1985).

to suppose that the "scope of" the ICC's approval of these leases in this case did not extend to authorizing consummation—indeed, at the time of the court of appeals ruling, the ICC had refused to stay consummation of the leases. And as both courts below recognized, if, as RLEA contends, the Railway Labor Act's major dispute provisions would prohibit consummation of the leases, it follows *a fortiori* that preemption of those provisions is "necessary to let [the carriers] carry out the transaction * * *." 49 U.S.C. § 11341(a). No decision of this Court provides any support for RLEA's contention that in a case in which preemption is thus determined to be necessary the district courts have some residual jurisdiction "to enforce the public policies" of the Railway Labor Act to restrain authorized § 11343 transactions (Pet. at 20.)

Indeed, *McLean Trucking*, *supra*, upon which RLEA places its principal reliance, requires precisely the opposite conclusion. RLEA notes that in *McLean* this Court stated that the ICC lacks power to enforce the Sherman Act and the "numerous other laws" apart from the Interstate Commerce Act that may be claimed to apply to a transaction subject to Commission approval (Pet. at 19.) But RLEA fails to mention the basis for that conclusion: The Court held that the Sherman Act was preempted by the predecessor provisions to §§ 11341-11351 of the Interstate Commerce Act, and thus that the ICC's judgment (subject to direct review in the appropriate court) must govern all antitrust questions presented by a covered transaction; to the extent that the policies of the antitrust laws and other federal laws are relevant to the transaction, the task of enforcing them is left to the ICC, for the "'wisdom and experience of that commission,' not of the courts, must determine whether the proposed [transaction] is 'consistent with the public interest.'" 321 U.S. at 85-87 (citations omitted).

That is dispositive of RLEA's claim that this Court's prior decisions permit the district courts to "enforce the public policies" of the Railway Labor Act or any "other law" to restrain § 11343 transactions.[16]

4. In sum, there is no occasion for this Court to determine with respect to transactions subject to ICC jurisdiction under § 11343 "whether there is a conflict between the two Acts of Congress, and if so, which statute prevails" (Pet. at 18.) That issue has long since been settled. Section 11341(a) is plain on its face, and for over 25 years the issue has been resolved uniformly by the courts of appeals under § 11341(a) and its predecessor in favor of the Interstate Commerce Act.

B. *Section 10505.* There is likewise no conflict among the circuits with respect to the effect of § 10505 on § 11341(a) immunity from the Railway Labor Act. Only two courts of appeals so far have been called on to consider that question, perhaps because the Act is so plain on its face. Both have rejected RLEA's contention that § 11341(a) immunity is lost when a transaction is authorized under § 10505. *Brotherhood of Loc. Engineers* v. *Boston & Maine Corp.*, 788 F.2d 794, 799-801 (1st Cir. 1986); *United Transp. Union* v. *Norfolk & W. Ry.*,

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[16] Nor does *Seaboard R. Co.* v. *Daniel*, 333 U.S. 118 (1948), which RLEA quotes at page 19 of the Petition, support RLEA's contention. *Seaboard* arose from a railroad's action in state court to enjoin the state attorney general from enforcing a state corporation law that the ICC had determined should be preempted under the predecessor to § 11341(a); the state answered by attacking the validity of the Commission's preemption ruling and asserted the right to enforce penalties for violation of its law. 333 U.S. at 120, 123. This Court upheld the state court's jurisdiction of the action, because

> "the relief requested in the complaint was the removal of an obstruction to the railroad's obedience to the order, not its suspension or annulment. Nor did the answer seek to have the enforcement of the order enjoined, although it did question its validity as a basis for the relief sought in the complaint." *Id.* at 123.

822 F.2d 1114, 1122-23 (D.C. Cir. 1987).[17] As we have pointed out, RLEA's contention is untenable because under § 10505(g)(2) the ICC's duty to condition authorization of a § 11343 transaction on appropriate labor protection under § 11347 is unaffected by exemptions under § 10505.

These "exempted" transactions are in fact "approved or authorized" within the meaning of § 11341(a), contrary to RLEA's contentions.[18] The effect of a § 10505 exemption is merely to relieve the parties to a transaction of the lengthy prior review requirements under §§ 11344 and 11345 of the Act, but it does not and cannot relieve them from the Commission's jurisdiction to determine whether or not the transaction may be permitted. The ICC cannot grant an exemption without considering whether the transaction or class of transactions covered by the exemption runs afoul of some policy of the Act, § 10505(a), and it retains "ongoing jurisdiction to reconsider" an exempted transaction and to revoke its authorization if that is warranted, § 10505(d). See *G. & T. Terminal Packaging*, *supra*, 830 F.2d at 1235. In

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[17] *Cf. G. & T. Terminal Packaging Co.* v. *Consolidated Rail Corp.*, 830 F.2d 1230, 1234 (3d Cir. 1987) (rejecting argument that statutory preemption under § 10501(d) of the Interstate Commerce Act for rates approved by the ICC is not available to rates approved by means of a § 10505 exemption). As RLEA points out in its Supplemental Brief, there is one contrary district court decision, *Burlington Northern R.R.* v. *United Transp. Union*, No. 88 C 2687 (N.D. Ill. June 9, 1988) (Pet. App. H.) That court, however, mistakenly believed that the question was resolved by the Third Circuit's decision in *Pittsburgh & Lake Erie*, *supra*, (Pet. App. H at 15a), where in fact there was no question but that § 11341(a) was inapplicable because the transaction at issue fell under § 10901 of the Interstate Commerce Act, to which § 11341(a) does not apply.

[18] *Cf. Hughes Air Corp.* v. *Public Utilities Comm'n*, 644 F.2d 1334, 1337-38 (9th Cir. 1981) (Air carriers subject to the Federal Aviation Act "exempted from certification still operate with authority granted by the [Civil Aeronautics Board]. Without an exemption they would be unable to operate in interstate commerce.").

short, as the ICC has observed, § 10505 exemptions are simply an alternative "standard method used to acquire Commission approval" of line transfers of all kinds. *Class Exemption for the Acquisition & Operation of Rail Lines*, *supra*, 1 I.C.C. 2d at 811. They do not, and cannot, abdicate the ICC's exclusive authority over § 11343 transactions.[19]

That is particularly true of the ICC's exclusive authority under § 11347 over disputes over the protections to which employees affected by § 11343 transactions may be entitled, and its duty to condition authorization of such transactions on imposition of appropriate protective arrangements. Section 10505(g) requires the Commission to exercise that authority in approving any § 11343 transaction through the exemption procedures. That is why, at least where the Railway Labor Act major dispute procedures are involved, an exempted transaction cannot "be treated as though it had not been subject to review *ab initio*": "The requirement that the Commission impose labor protective conditions when it exempts a transaction from prior review merely substitutes one form of continuing oversight for another." *United Transp. Union* v. *Norfolk & W.*, *supra*, 822 F.2d at 1122.[20]

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[19] This serves to distinguish the expiration of the statutory antitrust immunity for air carrier transactions formerly subject to CAB approval and now subject to Department of Transportation approval under the Federal Aviation Act, which RLEA contends should provide the model for analysis of the effect of the partial deregulation of rail carrier transactions under § 10505 of the Interstate Commerce Act (Pet. at 23.) The Federal Aviation Act immunity provision, 49 U.S.C. app. § 1384 (Supp. III 1985), is due to be sunsetted on January 1, 1989, because air carrier transactions will become entirely free from federal regulation at that time. See 49 U.S.C. app. §§ 1551(a)(6), 1551(b)(1)(C) (Supp. III 1985).

[20] For the same reason, RLEA is not aided by ICC decisions that antitrust immunity under § 11341(a) is not available in exempted transactions (Pet. at 22.) As the ICC explained in one such recent decision, "Immunity is limited to the 'scope of the issues we

III. This Case Is Not Representative Of Pending Cases That Do Present Issues As To § 10901 That Warrant Review, And Presents Unique Factual Circumstances That Render It Unsuitable For Review In This Court.

A. As stated in our Introduction and Summary of Argument, pp. 8-9, *supra*, RLEA has tried to present this case as the "best vehicle available to resolve * * * crucial issues" as to which the circuits are in conflict in other pending cases (Pet. at 25, 16-17). There is a conflict among the Circuits as to application of the Railway Labor Act on line sales subject to § 10901 of the Interstate Commerce Act. See n.10, *supra*. But § 10901 transactions are not subject to § 11341(a), or § 11347. Thus, the questions presented here—the effect of § 11341(a) on the application of the Railway Labor Act to a § 11343 transaction; and the effect of § 10505 on the application of § 11341(a) in view of the provisions of §§ 10505(g)(2) and 11347—are simply not involved in the § 10901 cases. The conflict in those decisions is likewise not involved here, and this case cannot serve as a vehicle to resolve it. As to the questions presented here, there is no conflict among the circuits.

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are charged to consider in providing our approval' to a transaction." *Railroad Consolidation Procedures—Trackage Rights Exemption*, 1 I.C.C.2d 270, 279 (1985) (citations omitted). The ICC can exempt transactions from detailed scrutiny of potential antitrust problems; it cannot exempt the labor impacts of § 11343 transactions from scrutiny. 49 U.S.C. § 10505(g)(2). The ICC accordingly takes the position, despite its view that § 11341(a) does not confer antitrust immunity upon exempted transactions, that § 11341(a) *does* preempt the Railway Labor Act's major dispute procedures in exempted transactions: "It is [the ICC's labor protection] order, not RLA [or labor agreements thereunder] that is to govern employee-management relations in connection with the approved transaction" under §§ 10505 and 11343; any other "result we believe is unacceptable and inconsistent with section 11341 of our act * * *." *Maine Central R.R., Georgia Pacific Corp., Canadian Pacific Ltd., & Springfield Terminal Ry.—Exemption from 49 U.S.C. 11342 and 11343*, ICC Finance Docket No. 30532 (served Sept. 16, 1985), *aff'd mem. sub nom. RLEA* v. *ICC*, 812 F.2d 1443 (D.C. Cir. 1987).

B. Moreover, wholly apart from the substantive merit of the decision below, this case is an unsuitable vehicle for review in this Court, either as a "representative" of other cases, decided under § 10901 rather than § 11343 of the Interstate Commerce Act, or on its own, because it presents unique facts that make it wholly unrepresentative of any other pending cases and may moot the case.

One factor that has led to the split in the circuits on the question whether the Railway Labor Act is preempted in § 10901 transactions is the absence of mandatory labor protection and the ICC's policy against discretionary imposition of such protection under § 10901 in the absence of unusual circumstances. The Third Circuit has concluded that unless the Railway Labor Act applies to § 10901 transactions employees will be "relegated to 'a small voice of protest'" before an unsympathetic Commission. See *e.g.*, *RLEA* v. *Pittsburgh & Lake Erie R.R.*, *supra*, 845 F.2d at 443 n.38 (citations omitted).[21] Under § 11347, however, the ICC must impose labor protection on § 11343 transactions such as the leases in this case, and thus the Third Circuit's concerns in § 10901 cases have no relevance here. In any event, the ICC found this case to be "unique," gave RLEA the benefit of intensive investigation and hearings on its complaints about the leases' effects on employees, and ultimately imposed "extraordinary labor protective conditions" on the railroads (Pet. App. 18a.) Whatever the ICC's practice may be in other cases, and whatever relevance that may have to the preemption issue there, here the ICC afforded labor a very meaningful "voice of protest."

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[21] See *id.* at 422 (noting that question presented there was "whether a railroad has a duty to refrain from completing a sale of its assets pending bargaining under the RLA over the effects of the sale on employees' working conditions, when the ICC has granted expedited approval to the (proposed) sale *without imposition of labor protective conditions*") (emphasis added).

Indeed, the ICC's remedies in this case may well satisfy RLEA's Railway Labor Act claims and render them moot. The June 12 arbitration award under the ICC's protection order requires ST to assume the lessor carriers' seniority rosters and collective bargaining agreements, and to make all employees whole for losses they have incurred through working under ST's agreement in the interim (Opp. App. 3a § 1, 4a § 3, 7a § 7.) That is the same relief RLEA sought on its Railway Labor Act status quo claim that is at issue on this petition: restoration of the "rates of pay, rules, and working conditions" in effect for employees of the lessor carriers prior to the leases. If the arbitration award withstands appeal, therefore, this case will be moot. Indeed, RLEA concedes that the arbitration award, among other events—including the Delaware & Hudson reorganization proceedings—"may eventually [a]ffect the justiciability of this case" (Supp. Br. at 5.)

* * * *

There is no conflict among the circuits as to the questions presented by this case. The decision below is plainly correct and indeed required by this Court's own decisions. The facts and legal issues presented in this case are unrepresentative of any of the pending § 10901 cases that RLEA points to as the source of "intolerable strain" in the railroad industry (Pet. at 25.) And, RLEA has just won an arbitration award that could moot its claims for relief if it is upheld on review. This case is not certworthy in its own right, and cannot serve as the proxy for any of the other cases that may warrant review.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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June 24, 1988

APPENDIX

APPENDIX

IMPLEMENTING AGREEMENT ARBITRATION
CONDUCTED PURSUANT TO DECISION OF
THE INTERSTATE COMMERCE COMMISSION
FINANCE DOCKET NOS. 30965, ET AL.
RICHARD R. KASHER, ARBITRATOR
JUNE 12, 1988

IN THE MATTER OF AN IMPLEMENTING AGREEMENT ARBITRATION

SPRINGFIELD TERMINAL RAILROAD COMPANY, AND
GUILFORD TRANSPORTATION INDUSTRIES, INC.

and

THE RAILWAY LABOR EXECUTIVES' ASSOCIATION

and

THE UNITED TRANSPORTATION UNION

Hearings Commenced: April 5, 1988

Hearings Held: April 25, 1988, Philadelphia, PA.
May 3, 1988, Washington, D.C.

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Eugene F. Lyden
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Hearings Concluded: May 21 and June 1, 1988 (Briefs received)

* * * *

IMPLEMENTING ARRANGEMENT ARBITRATION AWARD

WHEREAS, the Interstate Commerce Commission (ICC) has granted all affiliated carriers an exemption under 49 U.S.C. 10505 from the prior approval requirements of 49 U.S.C. 11343(a)(2) for intracorporate family lease transactions;

WHEREAS, Guilford Transportation Industries, Inc. (GTI) has caused its rail subsidiaries B & M, D & H, MEC and PT (the lessors) to lease their rail operations to their corporate affiliate, the ST;

WHEREAS, the ICC has required GTI to negotiate an implementing agreement as part of the *Mendocino Coast* conditions, as modified; and

WHEREAS, GTI and its employees' representatives have been unable to reach an agreement to provide the basis upon which the forces to perform the ST operations will be selected and assigned, and to apply the terms and conditions of the modified *Mendocino Coast* conditions to these lease transactions,

The following arbitrated implementing arrangement is hereby established pursuant to Article I, Section 4 of the *Mendocino Coast* conditions:

Section 1. Selection of Forces

Any selection and assignment of forces by the ST to perform operations over or in connection with the leased lines, facilities and property shall be made from the lessor carrier's appropriate seniority roster, in accordance with the seniority and selection of forces rules currently in effect for that lessor carrier's employees.

Section 2. Preservation of Equity

ST employees who have performed or are performing work for the ST on or in connection with a leased line or

an ST line to which they had no seniority rights prior to the leases, shall be given the option of having their name added to the appropriate seniority roster(s) of the B & M, MEC or PT craft or class of the lessor's employees whose collective bargaining agreement governs the working conditions of the craft work which the ST employee primarily performed or is performing on that leased line. The ST employee's seniority date on the lessor's appropriate seniority roster shall be governed by the applicable collective bargaining agreement of the lessor as if the ST employee's work on the leased line was performed under the applicable collective bargaining agreement.

Section 3. Applicable Collective Bargaining Agreement

ST, in operating the leased lines, facilities and properties, shall apply the rates of pay, rules and working conditions of the lessor.

Section 4. Individual Employee Rights

No employee of the B & M, MEC or PT shall be deemed to have forfeited any rights or benefits under the *Mendocino Coast* conditions or existing collective bargaining agreements, as a consequence of any decision made, in reference to that employee's employment with any GTI subsidiary, during the period beginning when first affected by a lease and ending with the effective date of this implementing arrangement.

Section 5. Claims Procedures

(a) All claims for make-whole allowances, as provided for in Section 7 of this award, shall be filed with:

R. Akins
Guilford Transportation Industries
Human Resources Department
Iron Horse Park
North Billerica, MA. 01862

Within sixty (60) days of the effective date of this implementing arrangement. Such claims shall be made on forms to which the parties have agreed.

(b) GTI shall notify the claimant for a make-whole allowance in writing within sixty (60) days of receiving such a claim whether that employee's claim is accepted or denied. If denied, GTI shall state in detail the reason(s) for the denial. If a claim is not denied by the sixtieth day, the claim shall be considered as having been allowed as presented. A claim so allowed shall not be considered as a precedent for similar claims.

(c) All claims for separation allowances under Article I, Section 7 of the *Mendocino Coast* conditions must also be filed with Mr. R. Akins at the above address, within seven (7) days of the effective date of this implementing arrangement, or of the date of the employee's dismissal, whichever is later.

(d) GTI must notify the separation allowance claimant in writing within ten (10) days of receipt of such separate allowance request whether it accepts or denies that claim. If the claim is to be denied, GTI must state in detail the reason(s) for that denial. If a claim is not denied within the ten (10) day period, it shall be considered as having been allowed.

(e) All claims for displacement or dismissal allowances under Article I, Sections 5 or 6 of the *Mendocino Coast* conditions must be filed with Mr. R. Akins, at the above address within sixty (60) days of the close of the month for which the displacement or dismissal allowance claim is being made. Such claims shall be made on the appropriate claim forms to which the parties have agreed.

(f) GTI shall notify the displacement or dismissal allowance claimant, in writing, within sixty (60) days of the date that such a claim is filed whether it allows or denies the claim. If the claim is denied, GTI must explain in

detail the reason(s) for the denial. If the claim is not denied by the sixtieth day after it is filed, the claim shall be considered as having been allowed as presented. A claim so allowed shall not be considered as precedent for similar claims.

(g) Claims for relocation expenses incurred subsequent to the effective date of this implementing arrangement shall be presented in writing to Mr. R. Akins, at the above address, within ninety (90) days of the date that the expense or loss is incurred.

(h) GTI shall notify the relocation allowance claimant in writing within sixty (60) days of the date that such a claim is filed whether it allows or denies the claim. If the claim is denied, GTI must explain in detail the reasons for the denial. If the claim is not denied by the sixtieth day after it is filed and in the manner set forth herein, the claim shall be considered as having been allowed as presented. A claim so allowed shall not be considered as a precedent for similar claims.

(i) All claims shall be deemed filed on the date that the claim is postmarked, if mailed and properly addressed to Mr. R. Akins at the above address, or on the date that it is received by the Carrier if transmitted by any other method.

(j) Any claim denied in accordance with this Section shall be final unless the claimant or his or her representative invokes the appropriate arbitration provisions of Article I, Sections 11 or 12 of the *Mendocino Coast* conditions within sixty (60) days of the date on which the claim was denied.

Section 6. Outstanding Separation Allowances

All B & M, MEC and PT employees who previously elected to accept a separation allowance when initially unable to obtain a job with their employer in the normal exercise

of their seniority are hereby given the option of resigning and receiving a lump sum separation allowance if there is no comparable job available to them through the normal exercise of their seniority, or of returning to service with all rights unimpaired. Any employee who received a lump sum separation allowance shall be given an option to be recalled to service and if the separated employee accepts, all seniority rights shall be reinstated; an employee who accepts such a recall shall be given the option of repaying the separation allowance, less the make-whole allowance, or of having his/her compensation and/or protective allowances reduced monthly by 1/12 of the separation allowance paid until the net amount is credited.

Section 7. Make-Whole Allowances

All B & M, D & H, MEC, PT and ST employees shall be made-whole for any loss of earnings suffered or extraordinary work-related expenses incurred during the period from which first adversely affected by a lease until the effective date of this implementing arrangement, less any time not available for service due to strike, job action or other cause. Such a make-whole allowance shall be calculated in the manner prescribed in Article I, Section 5 of the *Mendocino Coast* conditions.

Section 8. Test Period

The test period shall include the last twelve (12) months of compensated service that employees performed for their lessor carriers prior to the effective dates of the respective leases, in which months employees performed, at least, ten (10) days of compensated service.

Section 9. Protective Period

The protective period shall not begin to run until the effective date of this implementing arrangement, or when

the employee is adversely affected, whichever shall occur last.

Section 10. Payment of Allowances

All allowances should be paid in full within thirty (30) days after the allowance is due or the claim is sustained, whichever is later; except, dismissal allowance claims which should be paid within ten (10) days of their being sustained.

Section 11. Election of Benefits

Any employee who is eligible for benefits under an existing job security agreement or other protective conditions or arrangements, and the conditions implemented by this arrangement, must elect under which protective arrangement he/she will be protected by sending a letter to Mr. R. Akins, at the above address, within sixty (60) days of the effective date of this implementing arrangement or the date affected by a lease transaction, whichever shall occur last, stating under which protective arrangement he/she elects to be protected. Such an election letter shall not be necessary if the employee files a claim under the protective conditions implemented by this arrangement, in which case the employee shall be deemed to have elected the protections of this arrangment. Failure to file such an election shall not forfeit an employee's right to protection under the other protective arrangement. After the expiration of the period for which such employee is entitled to protection under the arrangement which he/she elects, he/she may then be entitled to protection under the other arrangement for the remainder, if any, of his or her protective period under that arrangement. Under no circumstances shall this section result in the pyramiding or duplication of benefits.

Section 12. Effective Date

This implementing arrangement shall be effective ten (10) days after the Carrier mails a copy of the arrangement, the appropriate claim forms and the appropriate test period calculations to all employees who held seniority on the lines which were leased or who worked for the ST on those lines. If the Postal Service returns any such mailing, the Carrier shall contact the appropriate Union official and shall cooperate with the Union in locating the employee's current address.

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Supreme Court, U.S.
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JUN 20 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1911

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Petitioners,

v.

GUILFORD TRANSPORTATION INDUSTRIES, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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SUPPLEMENTAL BRIEF OF PETITIONERS RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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IN THE

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---

SUPPLEMENTAL BRIEF OF PETITIONERS RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*

On May 23, 1988, petitioners Railway Labor Executives' Association [hereinafter, "RLEA"] and fifteen labor organizations filed a petition with this Court for a writ of certiorari to the United States Court of Appeals for the First Circuit to review the judgment of that court in *RLEA v. Guilford Transportation Industries, Inc.*, 1st Cir. No. 87-1774, decided January 20, 1988. This Supplemental Brief is respectfully submitted by petitioners RLEA, *et al.*, pursuant to Rule 22.6 of the Rules of this Court to bring to this Court's attention

a recent decision by the United States District Court for the Northern District of Illinois in *Burlington Northern R.R. v. UTU*, N.D.Ill. No. 88 C 2687, decided June 9, 1988, in which the court granted the unions' requests for a preliminary injunction to enforce the Railway Labor Act's major dispute and status quo provisions. RLEA has reproduced that decision as Appendix H to this brief. This Brief is also submitted to bring to this Court's attention two decisions by arbitrators in the separate arbitration proceedings referred to at page 10 and note 10 of the petition which may bear upon the continued justiciability of this case.

I. The District Court's Decision In *Burlington Northern* Conflicts With The First Circuit's Decisions At Issue In This Case

Rail labor's petition in this case seeks to have this Court review the relationship of the Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.*, to the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, in a factual setting where the Interstate Commerce Commission [hereinafter, "ICC" or "Commission"] has both exempted a rail financial transaction from regulation and imposed an arrangement to protect the interests of employees. At the time that RLEA and the other petitioners filed this petition, there was no other court decision which addressed the relevant issues in a factual setting which involved the specific statutory provisions that are at issue here—*i.e.*, 49 U.S.C. §§ 10505, 11343 and 11347—which require the ICC to impose provisions to protect employees. However, as RLEA explained in the petition, several courts had decided cases which dealt with the relationship of the two Acts of Congress in factual settings involving Section 10505 exemptions from regulation under 49 U.S.C. § 10901 where the Commission did not impose conditions to protect employees. *E.g.*, *RLEA v. Pittsburgh & Lake Erie R.R.*, 845 F.2d 420 (3rd Cir 1988), *pet. for cert. pending*, Sup. Ct. No. 87-1888. Since the filing of the pe-

tition in this case, the United States District Court for the Northern District of Illinois in the *Burlington Northern* case addressed many of the issues raised by RLEA in a factual setting virtually identical to that presented here.

In *Burlington Northern*, the carrier first approached rail labor to enter into modifications to the collective bargaining agreements to make its operations more economical. Appendix H at 3a. A similar initial collective bargaining effort was made in the *Guilford* case. *See*, Pet. Appendix B at 16a. Once its collective bargaining approach failed, the Burlington Northern entered into an intra-corporate family financial transaction—*i.e.*, a trackage rights agreement—whereby that carrier sought to use a subsidiary to achieve the cost savings that it had hoped to obtain under its proposed modifications to the collective bargaining agreements. Appendix H at 5a-6a. Guilford entered into its leases with the Springfield Terminal Railway Company [hereinafter, "ST"] for the same reasons. Pet. Appendix B at 13a, 16a. In both cases the carriers exercised class exemptions which the ICC had granted under 49 U.S.C. § 10505 from the prior approval requirements of 49 U.S.C. § 11343(a), and in both cases the ICC imposed employee protective conditions as required by 49 U.S.C. §§ 10505(g)(2) and 11347.

In *Guilford*, the district court concluded that the First Circuit's decision in *BLE v. Boston & Maine Corp.*, 788 F.2d 794 (1st Cir.), *cert. denied*, 107 S.Ct. 111 (1986), controlled its consideration of rail labor's efforts to enforce the Railway Labor Act and held that 49 U.S.C. § 11341(a) applied to that case, relieving the Guilford system of their obligations under the Railway Labor Act. Pet. Appendix B at 14a-16a. Burlington Northern also relied upon *BLE v. Boston & Maine Corp.* to argue that Section 11341(a) applied and relieved it of its collective bargaining obligations. However, the *Burlington Northern* court rejected that argument, stating: "[U]nlike transactions subject to ICC approval under § 11343, Con-

gress did not expressly provide that a § 10505 exemption relieves the involved carriers of any attendant statutory duties, such as their obligation under" the Railway Labor Act. Appendix H at 15a. That conclusion is in direct conflict with the conclusion which the First Circuit had reached in *BLE v. Boston & Maine Corp., supra*, 788 F.2d at 800-01, but, RLEA respectfully submits, is clearly correct, for it is compelled by Section 11341 (a)'s language, that Section's legislative history, and by ICC decisions in non-labor situations. Pet. at 21-23.

Besides rejecting the applicability of Section 11341(a)'s immunity to rail exemptions, the *Burlington Northern* court also addressed the underlying issue presented in *Guilford* as to whether the Railway Labor Act must "yield to labor protective conditions accompanying any approval or § 10505 exemption not subject to the express preemptions of § 11341." Appendix H at 15a. After examining the purposes behind both Acts, the court concluded "that the labor protective conditions accompanying the exemption of a trackage rights agreement between a carrier and its wholly-owned financially-dependent subsidiary implicating substantial rail traffic do not relieve the carrier of its attendant obligations under" the Railway Labor Act. Appendix H at 18a. That decision, which is in direct conflict with *Guilford*, was reached in part because of the nature of rail exemptions under Section 10505; as the *Burlington Northern* court explained (Appendix H at 18a):

> [T]ransactions exempted from administrative approval are by definition transactions that do not impact the transportation policy of the ICA. The ICC exempts a transaction such as a trackage rights agreement only if the ICC finds that the transaction "is not necessary to carry out the transportation policy" of the Staggers Act. 49 U.S.C. § 10505(a)(1). Thus, in any direct or indirect conflict between an exemption pursuant to § 10505 and a fundamental time-honored federal labor policy, the former must yield.

That analysis, rail labor respectfully submits, is relevant to this case and to the three other petitions that are currently pending before this Court which all raise the question of the relationship of the Interstate Commerce Act to the Railway Labor Act in rail exemption cases. Sup. Ct. No. 87-2049, *RLEA v. Chicago & North Western Transportation Co.*, Sup. Ct. Nos. 87-1888 and 87-1589, *Pittsburgh & Lake Erie RR. v. RLEA.*

II. Several Events Have Occurred Since The Petition Was Filed Which May Eventually Effect The Justiciability Of This Case

In their petition, the rail labor petitioners informed this Court that there were two separate arbitration proceedings under way which dealt with different aspects of the disputes between rail labor and the Guilford Rail System. One of those arbitrations—*i.e.*, the Safety Arbitration—arose out of the strike which the employees of the ST began on November 12, 1987. The second arbitration—*i.e.*, the Implementing Arrangement Arbitration—was to devise the arrangement called for by the ICC's February 19, 1988 decision to implement the employee protective conditions imposed by that ICC order. *See*, Pet. Appendix C at 23a-24a.

On June 13, 1988, the Safety arbitrator concluded that the strike was protected by Section 212 of the Federal Railroad Safety Act, 45 U.S.C. § 441, and that the ST had to recall all employees who participated in that strike, with back-pay from November 12, 1987, until recalled. The Implementing Arrangement arbitrator issued his decision on June 12, 1988, concluding that the ST had to use the seniority rosters of the lessor-carriers and their collective bargaining agreements in selecting and assigning the forces to perform the lease operations. At present, it is too early to state what impact those arbitration decisions will have on the Guilford Rail System, or on this petition. However, it appears that Guil-

ford will ask the ICC to set aside the implementing arrangement award, but in the interim, will not implement the Delaware & Hudson Railway [hereinafter, "D&H"] leases; it also appears that the D&H may seek protection under the railroad reorganization provisions of the Bankruptcy Code, 11 U.S.C. § 1161, *et seq.* *See*, *Wall Street Journal*, June 20, 1988 at 5, col. 2. RLEA does not know at this time whether Guilford will seek to rescind the implemented leases.

In view of the uncertainties which exist at this time as to whether this case will continue to present a live case or controversy later this year or early next year, RLEA respectfully suggests that this Court grant both the petition in this case and RLEA's petition in No. 87-2049. That way, the Court will still have available to it the *Chicago & North Western* case if the *Guilford* case becomes moot prior to argument or decision; moreover, if RLEA's motion to expedite is granted, the rail industry will not have lost the opportunity to brief these issues over the summer.

Respectfully submitted,

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Date: June 20, 1988

APPENDIX

APPENDIX H

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 88 C 2687

BURLINGTON NORTHERN RAILROAD COMPANY,
Plaintiff,

v.

UNITED TRANSPORTATION UNION INTERNATIONAL; M. M. WINTER, GENERAL CHAIRMAN; W. P. TORRES, LOCAL CHAIRMAN; R. J. DAURER, LOCAL CHAIRMAN; AMERICAN TRAIN DISPATCHERS ASSOCIATION; BROTHERHOOD OF LOCOMOTIVE ENGINEERS; BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES [sic]; BROTHERHOOD OF RAILROAD SIGNALMEN; BROTHERHOOD RAILWAY CARMEN (DIVISION OF TCU); HOTEL AND RESTAURANT EMPLOYEES INTERNATIONAL UNION; INTERNATIONAL ASSOCIATION OF MACHINISTS; INTERNATIONAL BROTHERHOOD OF BOILERMAKERS AND BLACKSMITHS; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; INTERNATIONAL BROTHERHOOD OF FIREMEN & OILERS; RAILROAD YARDMASTERS OF AMERICA (DIVISION OF UTU); SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION and TRANSPORTATION COMMUNICATIONS UNION,
Defendants.

No. 88 C 4528

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Plaintiff,

v.

BURLINGTON NORTHERN RAILROAD COMPANY and WINONA BRIDGE RAILWAY COMPANY,
Defendants.

MEMORANDUM OPINION AND ORDER

MARVIN E. ASPEN, District Judge:

The Burlington Northern Railroad Company ("Burlington") entered into a trackage rights agreement with its wholly-owned subsidiary, the Winona Bridge Railway Company ("Winona"), whereby Winona is to operate Burlington trains over certain routes. The unions representing Burlington employees view the agreement as an unlawful attempt to unilaterally circumvent the provisions of various collective bargaining agreements. Burlington filed this action for a judgment declaring the legitimacy of the agreement and for an injunction to prevent the union from striking because of the agreement. The unions counterclaimed to prevent Winona from operating trains under the agreement.

Currently before this Court are two motions for preliminary injunction. The unions move to enjoin implementation of the trackage rights agreement. Burlington moves to enjoin a threatened strike. For the reasons set forth in this memorandum opinion, we grant the unions' motion and deny Burlington's motion.

Factual Background and Procedural History

Burlington is a Class I railroad carrier subject to the jurisdiction of the Interstate Commerce Commission ("ICC") and the provisions of the Interstate Commerce Act ("ICA"), 49 U.S.C. §§ 10101-11917, and the Railway Labor Act ("RLA"), 45 U.S.C. §§ 101 [*sic*] *et seq.* (1926). The defendant-unions are the collective bargaining representatives for Burlington's employees within the meaning of the RLA. The United Transportation Union ("UTU") represents Burlington's conductors, brakemen and switchmen. The Brotherhood of Locomotive Engineers ("BLE") represents engineers. Under current union contracts, Burlington must maintain a crew consisting of an engineer, a conductor and one or two brakemen on any trains operating over its northern lines.

In an effort to reduce its operating costs to compete with other motor and rail carriers, Burlington sought renegotiation of the union contracts to eliminate one brakeman from all railroad crews and to begin operating "expediter trains" with crews of only one engineer and one conductor. Most of the unions' local committees acceded to Burlington's request as applied to Burlington lines running through various portions of the United States, including the Chicago-St. Paul and Chicago-Houston lines. However, Burlington was less successful with union local committees for lines running through the northern corridor of the continental United States. Specifically, in negotiation sessions through July and August of 1987, the UTU refused to grant Burlington the crew consist and expediter train concessions for trains operating between and within the states of Wisconsin and Washington.

After its unsuccessful attempts to renegotiate the union contracts at the bargaining table, Burlington tried another approach. On November 16, 1987, Burlington entered into the trackage rights agreement with Winona. Throughout all periods relevant to this action, Winona's assets consisted of an out-of-service bridge, accompanying operating equipment and 1.07 miles of railroad track. Winona employed five individuals, none of whom ever actually operated trains over the distances contemplated by the agreement. By the terms of the trackage rights agreement, Burlington granted Winona the right to operate Burlington trains over the 1,860 miles of track between Winona Junction, Minnesota, and Seattle, Washington, and pick up and set out traffic in three cities. Burlington agreed to provide any needed equipment.

After the agreement was signed, Winona asked UTU and BLE to begin to negotiate a collective bargaining agreement for personnel operating trains under the trackage rights agreement. The UTU considered the Winona-Burlington agreement an unabashed attempt by Burling-

ton to avoid its obligations under current union contracts and accordingly served notice pursuant to Section 6 of the RLA, 45 U.S.C. § 156, that the agreement constituted a unilateral change in working rules and conditions and was subject to mandatory bargaining before Burlington could initiate operations pursuant to the agreement.

Burlington refused to submit to the dispute resolution mechanisms of the RLA, contending that an ICC exemption relieved it of any duties under the RLA. Burlington and Winona filed with the ICC a request for an exemption under 49 U.S.C. § 10505(a)[1] and its implementing regulation, 49 C.F.R. § 1180.2(d)(7).[2] As is

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[1] Section 10505(a) provides:

§ 10505. Authority to exempt rail carrier transportation

(a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under this subchapter, the Commission shall exempt a person, class of persons, or a transaction or service when the Commission finds that the application of a provision of this subtitle—

(1) is not necessary to carry out the transportation policy of section 10101a of this title; and

(2) either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power.

[2] Section 1180.2(d)(7) provides:

§ 1180.2. Types of transactions

* * * *

(d) A transaction is exempt if it is within one of the seven categories described below . . .

* * * *

(7) Acquisition of trackage rights and renewal of trackage rights by a rail carrier over lines owned or operated by any other rail carrier or carriers that are: (i) based on written agreements, and (ii) not filed or sought in responsive applications in rail consolidation proceedings.

standard procedure, the ICC automatically granted the exemption on November 25, 1987, with the accompanying mandatory labor protective conditions of *Mendocino Coast Railway Company—Lease and Operate*, 354 I.C.C. 732 (1978), 360 I.C.C. 653 (1980), *aff'd sub nom. Railway Labor Executives' Asso. v. United States*, 675 F.2d 1248 (D.C. Cir 1982).[3] The unions challenged the validity of the exemption by filing pursuant to § 10505(d) petitions to stay, reject and revoke the exemption. The ICC has yet to rule on the unions' petitions to revoke.[4]

Burlington notified all of its employees by letter of the Winona transaction and its intentions to commence operations under the agreement by early April 1988. Burlington acknowledged in the letter that it entered into the trackage rights agreement with Winona only because the local committees of the UTU refused to yield in negotiations to Burlington's crew consist and expediter train demands:

> WBRR [Winona] is BN's (Burlington's] *second choice*. BN would have preferred to have successfully negotiated with the UTU Northern Line committees to make BN more competitive. Because representatives of these committees have been unwilling to negotiate the necessary agreement, WBRR will

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[3] Included among the *Mendocino Coast* conditions are guarantees of a displacement allowance, moving expenses and up to six years of wages to current Burlington employees dismissed as a direct result of the transaction.

[4] In a January 7, 1988 order, the ICC denied the petitions to reject, finding irrelevant Burlington's motivation in filing for an exemption. Two of the five commissioners would have rejected the petition on the grounds that Winona may very well not be "another carrier" within the meaning of 49 C.F.R. § 1180.2(d)(7). On March 7, 1988, the ICC denied UTU's petition to stay. The Eighth Circuit dismissed UTU's subsequent appeal on the grounds that the Court lacked jurisdiction without a final order from the ICC, apparently on the petitions to revoke. The Eighth Circuit has yet to issue its opinion.

begin operations as soon as it can obtain union representation and finalize customer contracts.

The unions threatened to strike if Burlington began operating trains under the trackage rights agreement. On March 29, 1988, Burlington filed this action against the unions, union associations and various union officers seeking a declaratory judgment that implementation of the trackage rights transaction does not violate the RLA and an injunction enjoining the unions from in any way interfering with the transaction. The unions counterclaimed, charging Burlington with violations of the RLA and seeking appropriate declaratory and injunctive relief. Defendant-counterplaintiff UTU moves for a preliminary injunction enjoining implementation of the trackage rights agreement.[5] Burlington also moves to enjoin the threatened strike. Burlington and Winona have represented to this Court that they will delay initiating operations under the trackage rights agreement until June 10, 1988.

The Motions for Preliminary Injunction

We are guided by the following standards in deciding the parties' respective motions for preliminary injunction. To obtain injunctive relief prior to final judgment in a lawsuit, the plaintiff must demonstrate a reasonable likelihood of success on the merits of the case, that the harm the plaintiff will suffer without the injunction outweighs the harm that the injunction will inflict on the defendant and that granting the injunction will not disserve the public interest. *On/TV of Chicago v. Julien*,

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[5] BLE filed a separate action against Burlington and Winona in the Eastern District of Washington and similarly moved to enjoin implementation of the trackage rights agreement. On May 20, 1988, United States District Court Judge Robert J. McNichols transferred the case to this Court, and we have appropriately ordered that the two actions be treated as related cases. Our decision here applies equally to BLE's motion for preliminary injunction.

763 F.2d 839, 842 (7th Cir. 1985). The stronger the plaintiff's case is on the merits, the less heavily need the balance of harms weigh in the plaintiff's favor. *Roland Machinery Co. v. Dresser Industries, Inc.*, 749 F.2d 380, 387 (7th Cir. 1984); *Miss Universe, Inc. v. Flesher*, 805 F.2d 1130, 1134 (9th Cir. 1979); *American Airlines, Inc. v. A 1-800-A-M-E-R-I-C-A-N Corp.*, 622 F.Supp. 673, 681 (N.D. Ill. 1985).

In support of its motion, the UTU contends that implementation of the trackage rights agreement creates a "major dispute" between Burlington and the unions, and Burlington is therefore required under the RLA to stay railroad operations under the agreement until the parties exhaust the mandatory bargaining procedures of the RLA. Burlington contends that the parties are embroiled in, at most, a "minor dispute" and, accordingly, Burlington may implement the agreement while the parties submit their dispute to binding arbitration. Further, Burlington argues, the ICC exemption relieves Burlington of any attendant obligations under the RLA, and the unions may not collaterally attack an ICC exemption in court under the guise of the RLA. In any event, Burlington concludes, the unions have not demonstrated that they would suffer irreparable injury prior to final judgment if Winona begins operating trains.

We first address the parties' respective positions as to the duties that the RLA imposes in this dispute and conclude that Burlington cannot operate trains under the trackage rights agreement until it has completed the dispute resolution mechanisms set forth in Sections 5 and 6 of the RLA, 45 U.S.C. §§ 155, 156. We next address the implications of the ICA and conclude that an ICC exemption of a trackage rights agreement between a carrier and a wholly-owned financially-dependent subsidiary involving substantial lengths of track does not relieve the carrier of its duties under the RLA regardless

of the imposition of accompanying labor protective condition.

The Unions' Likelihood of Success Under the Railway Labor Act

In an effort to end the recurrent work stoppages in rail commerce that accompanied virtually any dispute between labor and management, Congress passed the RLA compelling the parties "to settle all disputes . . . in order to avoid any interruption to commerce or to the operation of any rail carrier," 45 U.S.C. § 152, First, by resorting to certain specified dispute resolution mechanisms. The RLA sets forth two separate sets of settlement procedures, and the nature of the dispute—major or minor—determines the procedures that the parties must follow:

> [A major dispute] relates to . . . the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.
>
> [A minor dispute, or "grievance"] however, contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one.

45 U.S.C. § 151(a)(4), (5); *Elgin, J. & E Railway Co. v. Burley*, 325 U.S. 711, 723, 65 S.Ct. 1282, 1290 (1945). *See also Chicago & Northwestern Transp. Co.* v. *United Transp. Union*, 656 F.2d 274 (7th Cir. 1981).

If labor and management are involved in a minor dispute, they must submit to binding arbitration under the auspices of the National Railroad Adjustment Board or

a special adjustment board. 45 U.S.C. § 153, First and Second. Pending the arbitration board's decision, the railroad may "continue to apply its interpretation of the agreement" and go ahead with its planned change in operations. *National Railway Labor Conference v. International Asso. of Machinists*, 830 F.2d 741, 749 (7th Cir. 1987). The union may not, however, strike while the dispute is in arbitration or after the arbitration board renders its judgment. Accordingly, a district court can enjoin a strike arising from a minor dispute. *Brotherhood of R.R. Trainmen v. Chicago River and Indiana R.R. Co.*, 353 U.S. 30, 41-42, 77 S.Ct. 635, 640-41 (1957); *Atchison, Topeka & Santa Fe Ry. Co. v. United Transp. Union*, 734 F.2d 317, 320 (7th Cir. 1984).

If, on the other hand, labor and management are embroiled in a major dispute, the parties must participate in good faith in a specified series of non-binding settlement procedures, including negotiation and conference, mediation under the auspices of the National Mediation Board and acceptance or rejection of binding arbitration, as well as cooling-off periods. 45 U.S.C. §§ 155, 156; *Elgin v. Burley*, 325 U.S. at 725, 65 S.Ct. to 1290-91. Throughout these proceedings, a status quo prevails. 45 U.S.C. §§ 155, 156, 160. Thus, unlike a minor dispute, the carrier cannot unilaterally implement its plans but must "preserve and maintain unchanged those actual, objective working conditions and practices, broadly conceived, which were in effect prior to the time the pending dispute arose and which are involved in or related to that dispute." *Detroit & Toledo S.L.R. Co. v. United Transp. Union*, 396 U.S. 142, 152-53, 90 S.Ct. 294, 300-301 (1969). Only after all of the settlement procedures have been exhausted may the carrier implement its plan or the union organize a work stoppage.

We have no difficulty concluding that the dispute here between the UTU and Burlington regarding working conditions on trains operated pursuant to the trackage

rights agreement is a major dispute suject [*sic*] to the mandatory bargaining and status quo provisions of the RLA. As Burlington made clear in the letter to its employees, the trackage rights agreement is an attempt to operate trains with crews smaller than those mandated by union contract. The parties do not dispute the existence or interpretation of the pertinent terms of current collective bargaining agreements. Rather, Burlington seeks to alter the terms of the collective agreement as applied to operations by Winona pursuant to the trackage rights agreement.

That Winona and not Burlington, its parent corporation, will operate the trains is of no consequence to our decision. As numerous courts have made clear, a carrier cannot evade its duties under a union contract and the RLA by diverting business currently subject to the contract to an entity within the corporate family that is not covered by the collective bargaining agreements. *International Asso. of Machinists and Aerospace Workers v. Eastern Airlines, Inc.*, No. 87-1720, 127 L.R.R.M. 3078, 1988 U.S. Dist. LEXIS 3335 (D.D.C. March 10, 1988), *vacated and remanded on other grounds*, No. 88-7079 (D.C. Cir. June 7, 1988) ("*Eastern Airlines*"); *Butte, Anaconda & Pacific Ry. Co. v. Brotherhood of Locomotive Firemen and Enginemen*, 268 F.2d 54 (9th Cir.), *cert. denied*, 361 U.S. 864, 80 S.Ct. 122 (1959) ("*Butte*"). The transfer of assets and personnel to a wholly-owned subsidiary in order to circumvent obligations to employees arising out of a union contract violates the status quo provisions of the RLA, and a district court may enjoin such transfer. *Eastern Airlines*, slip op. at 8-9.

In *Butte*, the Ninth Circuit was faced with a railway dispute very similar to the dispute here between UTU and Burlington. Butte-Anaconda, the rail carrier, sought to operate a new switching yard with crews smaller than required under an existing union contract. Failing to

successfully negotiate the reduced crews with the union, Butte-Anaconda arranged for Anaconda, its parent corporation, to take over the switching yard and thereby remove the yard from the reach of the union contract. The Ninth Circuit held that a carrier cannot evade the mandatory bargaining and status quo provisions of the RLA by redirecting work through any kind of arrangement to a corporate entity that shares "common principal officers and the unified purpose of serving the ultimate best interests" of the corporate parent. 268 F.2d at 59. Here, Burlington, the carrier, was unsuccessful in modifying the union contract as to crew size through negotiation and now seeks to evade its contractual duties by selling trackage rights to a wholly-owned subsidiary that is financially dependent upon and beholden to the carrier. As *Butte* makes clear, exhaustion of the settlement procedures of the RLA must precede the implementation of such an arrangement.

Burlington seeks to distinguish these cases by pointing out that it will not transfer to Winona any business currently handled by Burlington employees. Specifically, the trackage rights agreement allows Winona to operate trains only to service new business which Burlington could never have obtained on lines subject to current union contracts. We are unconvinced by this argument. First, the trackage rights agreement itself contemplates possible transfers of business in the future. Further, the agreement does not preclude "swap arrangements" whereby Burlington sells current business to a third carrier in return for "new business" that may be directed to Winona. The mere prospect of having work shifted to a replacement subsidiary is a change in working conditions and practices subject to the status quo and mandatory bargaining provisions of the RLA. *Airline Pilots Asso., International v. Transamerica Airlines, Inc.*, 817 F.2d 510 (9th Cir. 1987). In any event, the work to be performed by employees operating Winona trains is identical to that performed by current Burlington employees.

"The deprivation of a work opportunity involving the type of work traditionally performed by the Union is a change in working conditions, even where the work is new." *Transport Workers Union v. Eastern Air Lines, Inc.*, 544 F.Supp. 1315, 1327 (E.D.N.Y.), *aff'd and modified*, 695 F.2d 668 (2d Cir. 1982). *See also St. Louis S.W. Ry. Co. v. Brotherhood of Signalmen*, 665 F.2d 987, 993 (10th Cir. 1981), *cert. denied*, 456 U.S. 945, 102 S.Ct. 2011 (1982) (finding a major dispute when a carrier allowed non-union employees to perform work previously performed by bargaining unit employees). Allowing a carrier to evade its union contract on the assertion that the non-union work is merely business that the carrier never could have obtained with the contract provides an easy avenue to evade any union contract.

Finally, Burlington attempts to characterize this dispute as a minor dispute with evidence that the unions never opposed past trackage rights agreements and always found ICC-imposed employee protective conditions satisfactory. It is well established that a dispute over a practice of the carrier is a minor dispute if the carrier performed similarly in the past with the union's knowledge and acquiescence. *Detroit and Toledo Shoreline R.R.*, 396 U.S. at 153-54, 90 S.Ct. at 301; *National Railway Labor Conference*, 830 F.2d at 747; *Main* [*sic*] *Central R.R. Co. v. United Transp. Union*, 787 F.2d 780 (1st Cir.), *cert. denied*, 107 S.Ct. 169 (1986). In effect, the past practice constitutes an implied-in-fact contract between management and labor, and any dispute over the practice amounts to a dispute over the interpretation of a contract. This principle is inapplicable here, however, because Burlington's past trackage rights agreements differed significantly from the Burlington-Winona agreement: the past agreements did not grant rights to a wholly-owned financially-dependent subsidiary over relatively great lengths of trackage. Burlington has presented no evidence that the unions acquiesced in any trackage rights agreements such as its agreement with

Winona that constituted a real threat to the viability of the unions' collective bargaining agreements and essentially amounted to a blatant attempt to force union concessions unobtainable at the bargaining table.

Therefore, the UTU has demonstrated that its dispute with Burlington over working conditions on trains operated by Winona under the trackage rights agreement is a major dispute subject to the mandatory bargaining and status quo provisions of the RLA. We may enjoin Burlington from any threatened actions that would constitute a change in the status quo pending completion of the settlement procedures of the RLA.[6] *Chicago & Northwestern Ry. Co. v. United Transp. Union*, 402 U.S. 570, 91 S.Ct. 1731 (1971); *United Transp. Union v. Burlington Northern, Inc.*, 458 F.2d at 357. Burlington has stated that it plans to commence operations under the trackage rights agreement on June 10, 1988, in the event that this Court does not issue an injunction. This would constitute a change in the status quo and, accordingly, a preliminary injunction is warranted.

Implications of the ICC Exemption

The ICC must approve any agreement by which a rail carrier acquires trackage rights over another rail car-

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[6] Once the plaintiff has established the existence of a major dispute and a threatened change in the status quo, we may issue the preliminary injunction without finding that the plaintiff may suffer irreparable injury without an injunction, for such injury is ordinarily presumed. United Transp. Union v. Burlington Northern, Inc., 458 F.2d 354, 357 (8th Cir. 1972); Southern Ry. Co. v. Brotherhood of Locomotive Firemen and Enginemen, 337 F.2d 127, 133-34 (D.C. Cir. 1964). We find nevertheless that the union has demonstrated irreparable injury with evidence that Burlington employees would lose seniority rights during the pendency of this action if Winona operates Burlington trains with non-union personnel.

rier's lines. 49 U.S.C. § 11343(a)(6).[7] Labor protective conditions must accompany any such approval. § 11347. After the receipt of ICC approval, the carriers may go forward with the transaction free from the strictures of the antitrust laws and "all other law, including State and municipal law." § 11341(a). Thus, ICC approval under § 11343 (or an exemption pursuant to § 11343(e)(1) from such approval "in a matter related to a motor carrier") relieves the carriers of any obligations that the RLA would otherwise impose with respect to the transaction. Further, the unions may not strike the block implementation of an ICC-approved trackage rights agreement. *See, e.g., Missouri Pacific R.R. Co. v. United Transp. Union*, 782 F.2d 107 (8th Cir. 1986), *cert. denied*, 107 S.Ct. 3209 (1987).

The ICA additionally provides in § 10505 that the ICC may exempt from the approval requirements of § 11343 any rail transaction, including trackage rights agreements, that it determines:

> (1) is not necessary to carry out the transportation policy of section 10101a of this title; and
>
> (2) either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not necessary to protect shippers from the abuse of market power.

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[7] Section 11343(a)(6) provides:

> § 11343. Consolidation, merger, and acquisition of control
>
> (a) The following transactions involving carriers providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I (except a pipeline carrier), II, or III of chapter 105 of this title may be carried out only with the approval and authorization of the Commission:
>
> * * * *
>
> (6) acquisition by a rail carrier of trackage rights over, or joint ownership in or joint use of, a railroad line (and terminals incidental to it) owned or operated by another rail carrier.

49 U.S.C. § 10505(a); *Illinois Commerce Comm. v. Interstate Commerce Comm.*, 819 F.2d 311 (D.C. Cir. 1987). As with approved transactions, labor protective conditions must accompany any § 10505 exemption. 49 U.S.C. § 10505(g)(2); *McGinness v. Interstate Commerce Comm.*, 662 F.2d 853 (D.C. Cir. 1981). However, unlike transactions subject to ICC approval under § 11343, Congress did not expressly provide that a § 10505 exemption relieves the involved carriers of any attendant statutory duties, such as their obligations under RLA. *Railway Labor Executives' Asso. v. Pittsburgh & L.E. Ry. Co.*, 677 F.Supp. 830, 833 (W.D. Pa. 1987), *aff'd*, No. 87-3797, 128 L.R.R.M. 2030, 1988 U.S. App. LEXIS 4654 (3d Cir. April 8, 1988); *Burlington, Inc.—Control Exemption*, I.C.C. Decision No. MD-F-16248, slip op. at 6 (February 13, 1986); Ex Parte No. 282 (Sub-No. 9), *Railroad Consolidation Procedures—Trackage Rights Exemption*, 1 I.C.C.2d 270, 279 (1985).

A number of courts have, however, found various federal labor statutes preempted by implication, holding that the RLA and the Norris-LaGuardia Act must in certain situations yield to labor protective conditions accompanying any approval or § 10505 exemption not subject to the express preemptions of § 11341. For example, the Eighth Circuit has held that preemption of the RLA and Norris-LaGuardia Act may accompany the exemption of a § 10901 purchase by non-carriers in the event that the ICC imposes labor protective conditions. *Burlington Northern, Inc. v. United Transp. Union*, No. 87-2600, 1988 U.S. App. LEXIS 7221 (8th Cir. May 31, 1988); *Railway Labor Executives' Asso. v. Chicago & Northwestern Transp. Co.*, No. 87-5071, 1988 U.S. App. LEXIS 7224 (8th Cir. May 31, 1988). Accordingly, the carriers may proceed with the transaction without exhausting the mandatory bargaining procedures of the RLA. The Eighth Circuit reasoned that mandatory bargaining would so delay the transaction as to undermine the ICC's efforts to encourage the efficient use of new and abandoned rail-

road lines in furtherance of the national transportation policy of the ICA. *Compare Railway Labor Executives' Asso. v. Pittsburgh & L.E.R.R. Co.*, No. 87-3797, 128 L.R.R.M. 2030, 1988 U.S. App. LEXIS (3d Cir. April 8, 1988) (holding that exemption of a § 10901 sale does not preempt the RLA in the absence of labor protective conditions without suggesting whether preemption attaches if the ICC does impose labor protective conditions).

Courts have similarly applied this judicially-constructed preemption to trackage rights agreements and other consolidations, mergers and acquisitions exempted under § 10505. In *Brotherhood of Locomotive Engineers v. Boston & Maine Corp.*, 788 F.2d 794 (1st Cir.), *cert. denied*, 107 S.Ct. 111 (1986), the First Circuit held that compliance with the labor protective conditions accompanying an exemption of a trackage lease relieves carriers of their obligations under the status quo and mandatory bargaining provisions of the RLA. The Court appeared to base its decision in part on the unchallenged assumption that exemptions under § 10505 of § 11343 transactions are automatically subject to the express preemptive language of § 11341. *See also Railway Labor Executives' Asso. v. Guilford Transp. Industries, Inc.*, 667 F. Supp. 29 (D. Me. 1987).

An important theme underlying all of these decisions is the need to defer to the ICC's role of reconciling the potentially conflicting provisions of the various union contracts that may cover the transaction. The courts recognize the potential crippling disorder that would accompany disputes between and among the numerous unions and railroad companies involved in a transaction. We are faced here with a situation as yet unaddressed by any other court and one not subject to such potential disruption—a carrier attempting to relieve itself of its duties under a collective bargaining agreement by transferring substantial trackage rights to a wholly-owned financially-dependent subsidiary. Such agreements, if al-

lowed to progress without the labor protections of the RLA, could be used by a carrier to systematically nullify its collective bargaining agreements while reaping the financial benefits from train operations no longer subject to the union contract. We must accordingly carefully examine the policies behind the RLA and the pertinent ICA provisions to determine whether in this situation the statutes are in irreconcilable conflict and an overriding policy served by the ICA mandates that the RLA give way. *Railway Labor Executives' Asso. v. Pittsburgh & L.E.R.R. Co.*, 831 F.2d 1231, 1234 (3d Cir. 1987).

The RLA is a labor statute that has been in effect, substantially unmodified, since 1926 and represents Congress' attempt to prevent the crippling work stoppages that plagued the railroad industry by forcing the parties to resolve their disputes through mandatory bargaining instead of the traditional forms of self-help. Through its sixty years of existence, the dispute resolution mechanisms of the RLA have become a bedrock of railway management-labor relations. Indeed, in apparent recognition of the RLA's success in bringing some calm to the railway industry, Congress has expressed no intention to repeal the RLA or modify any of its provisions.

The ICA, enacted in 1887, is fundamentally a commerce statute through which the federal government regulates interstate transportation. In an effort to promote competition and reasonable rates in rail transportation and relieve the railroad industry of some of the regulatory burdens of the ICA, Congress enacted the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 ("4-R Act"), and the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895. 49 U.S.C. §§ 10101 *et seq.* The 4-R Act empowered the ICC to exempt transactions or classes of transactions from administrative approval requirements. The Staggers Act expanded this power in the context of rail transactions. The approval and exemption provisions at issue in this

case fall within the Staggers Rail Act modifications to the ICA.

Two aspects of the ICA, as modified by the Staggers Act, are important to our analysis here. First, the ICA is not a labor statute, and Congress manifested no intent otherwise. Congress expressly identified the policies that it intended the Staggers Act to promote. Only one of these policies addresses the interests of the railroad industry employees:

> In regulating the railroad industry, it is the policy of the United States Government—
>
> * * * *
>
> (12) to encourage fair wages and safe and suitable working conditions in the railroad industry;

49 U.S.C. § 10101a. Second, transactions exempted from administrative approval are by definition transactions that do not impact the transportation policy of the ICA. The ICC exempts a transaction such as a trackage rights agreement only if the ICC finds that the transaction "is not necessary to carry out the transportation policy" of the Staggers Act. 49 U.S.C. § 10505(a)(1). Thus, in any direct or indirect conflict between an exemption pursuant to § 10505 and a fundamental time-honored federal labor policy, the former must yield.

With these considerations in mind, we conclude that the labor protective conditions accompanying the exemption of a trackage rights agreement between a carrier and its wholly-owned financially-dependent subsidiary implicating substantial rail traffic do not relieve the carrier of its attendant obligations under the RLA. In those decisions in which the courts held that ICC-imposed labor protective conditions superseded the RLA, the courts were not faced with a carrier making an agreement essentially with itself and then, through the good offices of the ICC, circumventing the mandatory bargaining procedures of the RLA in order to operate trains over substantial por-

tions of its tracks without abiding by the terms of its union contracts. Here, there is a very real danger that a carrier could, whenever it is unable to renegotiate its labor contracts to its satisfaction, force the unions to accede to its demands by shifting business (or funnelling new business) to a subsidiary in clear violation of the RLA, and then resorting to ICC exemption procedures to strip the unions of their protections under the RLA.

By the very terms of the Staggers Act, the benefits to the transportation policy of the ICA that accompany the exemption are minimal. Indeed, the benefits would accrue, for the most part, to Burlington in the form of unions in a much weaker bargaining position by virtue of the inapplicability of the RLA. The potential harm to the RLA and the whole concept of collective bargaining agreements is, in the context of this case, significant. There is no evidence that Congress intended that the important *but limited* aim of the ICC in assuring fair wages and working conditions as it promotes railway commerce would undermine the foundation of a federal labor statute that has stood the test of time, virtually untouched. The potential harm to the basic policies of the RLA far outweigh any benefits to commerce that might accompany an exempted trackage rights agreement between a carrier and its wholly-owned subsidiary involving significant rail traffic. Accordingly the carrier is not relieved of its obligations under the RLA.

We are unpersuaded by Burlington's insistence that the administrative processes of the ICC and, ultimately, the labor protective conditions accompanying an exemption, assure that labor's interests are respected and preserved and therefore render the RLA unnecessary. In exemption proceedings before the ICC, the unions are, at most, a "small voice of protest" and labor's concerns are only one of fifteen [8] co-equal policies that the ICC must

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[8] These policies are listed at 49 U.S.C. § 10101a.

balance. *Railway Labor Executives' Asso.*, 831 F.2d at 1237, *quoting Texas and New Orleans R.R. Co. v. Brotherhood of R.R. Trainmen*, 307 F.2d 151, 158 (5th Cir. 1962), *cert. denied*, 371 U.S. 952, 83 S.Ct. 508 (1963). The mandatory bargaining provisions of the RLA contemplate that labor and management will negotiate on an equal footing in disputes affecting the boundaries of labor's basic rights and duties in the employment relationship. Nowhere did Congress express an intent to force the unions to rely on their limited position at the ICC to uphold their collective bargaining agreements when a carrier seeks to alter the terms of the agreements by directing substantial business otherwise handled by union members to a non-union subsidiary.

We are not unmindful that Burlington sees a genuine business opportunity in putting its excess trackage capacity on the northern lines to work in competition with other transportation modes and carriers. Burlington views current union contracts as impediments to such goals. The proper and lawful avenue for Burlington is to continue negotiations with the unions within the framework of the RLA, as it has done with the local committees in other portions of the United States, rather than directing business to a subsidiary whose profits will directly or indirectly accrue to Burlington and then rely on the ICC to dilute the unions' bargaining power.[9]

---

[9] Our decision in no way addresses the validity of the ICC exemption. The unions' challenge to the exemption itself is properly before the ICC in revocation proceedings, § 10505(d), and may ultimately be addressed by the Eighth Circuit pursuant to 28 U.S.C. §§ 2321 and 2342(5). Interstate Commerce Comm. v. Brotherhood of Locomotive Engineers, 107 S.Ct. 2360, 2365 (1987). We merely hold that a carrier cannot commence rail traffic under an exempted transaction that grants substantial trackage rights to a wholly-owned financially-dependent subsidiary until it reaches some accommodation with its unions through the mandatory bargaining procedures of the RLA.

Conclusion

Notwithstanding the ICC exemption, Burlington Northern may not initiate operations under its trackage rights agreement with Winona Bridge until it has exhausted the mandatory bargaining provisions of the Railway Labor Act. Accordingly, the United Transportation Union's and the Brotherhood of Locomotive Engineer's motions for preliminary injunction to enjoin the trackage rights agreement are granted, and the Burlington Northern's motion to enjoin a threatend strike is denied.[10]

For the reasons set forth in this opinion, it is ordered that, until final judgment is entered in this action, plaintiff-counterdefendants Burlington Northern Railroad Company and Winona Bridge Railway Company, their officers, agents, servants, representatives, employees and persons in active concert or participation with them who receive actual notice of this order by personal service or otherwise:

(1) are enjoined and restrained from unilaterally changing the rates of pay, rules and working conditions of employees represented by the United Transportation Union and Brotherhood of Locomotive Engineers until such time as Burlington initiates and exhausts the procedures set forth in the Railway Labor Act for changing such matters; and otherwise violating their obligations under the Railway Labor Act; and

(2) shall maintain the status quo as it existed prior to the inception of the present dispute by not commencing operations pursuant to the trackage rights agreement entered into by Burlington and Winona on November 16, 1987, until such

---

[10] Burlington Northern has presented evidence that the unions threatened to strike when the carrier implements the trackage rights agreement. There is no evidence that the unions will strike in the event that we enjoin implementation.

time as Burlington initiates and exhausts the dispute resolution procedures set forth in the Railway Labor Act; and

(3) shall exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions in accordance with Section 2, First, of the Railway Labor Act, 45 U.S.C. § 152, First, and otherwise comply with the requirements of the Railway Labor Act.[11]

/s/ Marvin E. Aspen
MARVIN E. ASPEN
United States District Judge

DATED 6/9/88
5:00 P.M.

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[11] The unions are to submit within three days a brief setting forth a proposed security pursuant to Fed. R. Civ. P. 65(c). Burlington Northern and Winona Bridge are to respond, if necessary, two days thereafter.

Supreme Court, U.S.
FILED
JUN 28 1988

No. 87-1911

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Petitioners,

v.

GUILFORD TRANSPORTATION INDUSTRIES, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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REPLY BRIEF OF PETITIONERS RAILWAY LABOR EXECUTIVES' ASSOCIATION, *ET AL.*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1911

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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REPLY BRIEF OF PETITIONERS RAILWAY LABOR EXECUTIVES' ASSOCIATION, *ET AL.*

Respondents Guilford Transportation Industries, Inc., Boston and Maine Corporation, Maine Central Railroad Company, Portland Terminal Company, and Springfield Terminal Railway Company [hereinafter, "GTI," "B&M," "MEC," "PT" and "ST," respectively] filed their brief in opposition to the petition by the Railway Labor Executives' Association [hereinafter "RLEA"] and fifteen (15) individual labor organizations seeking a writ of certiorari to the United States Court of Appeals for the First Circuit to review the judgment of that court in *RLEA v. GTI*, 1st Cir. No. 87-1774, decided January 20, 1988.[1] This reply brief is respectfully sub-

[1] On June 20, 1988, respondent Delaware & Hudson Railway Company [hereinafter, "D&H"] filed a petition to reorganize under

mitted by petitioners to respond to several statements and arguments made by respondents and to bring to this Court's attention a recent decision by the United States Court of Appeals for the Fifth Circuit, *RLEA v. City of Galveston*, 5th Cir. No. 87-6169, decided June 23, 1988, which addresses the underlying issue that permeates all four of the cases that are pending before this Court dealing with the relationship of the Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.*, to the Railway Labor Act, 45 U.S.C. § 151, *et seq.*[2]

I. Contrary To Respondents' Assertion, This Case Does Involve The Same Underlying Issue Concerning The Relationship Of The Interstate Commerce Act To The Railway Labor Act That Is Presented By The Two Petitions Involving The Impact On Rail Labor's Collective Bargaining Rights, Of The ICC's Jurisdiction Over Rail Line Sales To Newly-Formed Railroads

Respondents assert that this petition involves solely questions arising out of the relationship of the immunity provision of the Interstate Commerce Act, *i.e.*, 49 U.S.C. § 11341(a), to any obligation which may be created by the Railway Labor Act that may impede a rail carrier from obtaining the full benefits of the transaction authorized or exempted by the Interstate Commerce Commission [hereinafter, "ICC" or "Commission"]. GTI Brief at 8. Consequently, respondents' argument continues, the issues presented by this case "are entirely different from the questions presented in the other cases" which "all arise under § 10901 of the Interstate Commerce Act, rather than § 11343, and thus are subject to neither § 11341(a) immunity nor mandatory labor protection under § 11347 . . . ." *Id.* Petitioners disagree

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11 U.S.C. § 1161, *et seq.*, and that petition was accepted by the United States Bankruptcy Court for the District of Delaware as No. 88-342. Respondent D&H did not file a response to the petition.

[2] Those cases, besides this one, are: Sup. Ct. No. 87-2049, *RLEA v. Chicago & North Western Transportation Co.*; Sup. Ct. Nos. 87-1888 and 87-1589, *Pittsburgh & Lake Erie R.R. v. RLEA*.

with respondents' attempt to limit the issues presented by this case, for when the issues which have been raised by both parties throughout this litigation are examined, it is clear that the underlying issue presented by this case is identical to the underlying issue presented by the two petitions arising from the Section 10901 sale cases—*i.e.*, Sup. Ct. Nos. 87-2049 and 87-1888.

When this case was before both the district court and the court of appeals, petitioners asserted that the same three (3) questions which they have presented as the questions for review by their Petition, were presented by the Railway Labor Act-Interstate Commerce Act aspect of this case. Respondents replied to those issues by asserting that their resolution was controlled by the First Circuit's decision in *BLE v. B&M*, 788 F.2d 794 (1st Cir.), *cert. denied*, 107 S. Ct. 111 (1986), where the appellate court concluded that 49 U.S.C. § 11341(a) relieved the rail carriers of their Railway Labor Act obligations (788 F.2d at 800-01), and that a suit to enforce the Railway Labor Act constituted an impermissible collateral attack on the ICC's exemption order. 788 F.2d at 801-02.

As petitioners explained in their Petition, if this Court agrees with rail labor that Section 11341(a) does not apply to rail transactions subject to regulation under Section 11343,[3] then the questions which must be ad-

[3] Contrary to respondents' assertion, this case will still present a question meriting review if this Court concludes that Section 11341(a) applies. As petitioners explained at pages 23-24 of their petition, since 1976, all ICC unification approval orders must contain employee protective conditions which, among other protections, require the rail carriers participating in the financial transaction to "preserv[e] . . . rights, privileges, and benefits . . . to such employees under existing collective-bargaining agreements or otherwise; [and to] . . . continu[e] . . . collective-bargaining rights . . . ." 45 U.S.C. § 565(b)(1) and (2). Thus, since no rail carrier may seek to implement a unification transaction to which Section 11341(a)'s immunity applies in a manner which will violate the

dressed are first, "whether the Railway Labor Act should be accommodated to the Interstate Commerce Act scheme for the determination of labor protection in [transactions] . . . subject to the Commission's jurisdiction" (Response of Chicago & North Western Transportation Co. to Motion to Expedite in No. 87-2049 [hereinafter, "C&NW Response"] at 3), and second, whether the federal courts have jurisdiction to enforce the Railway Labor Act in the face of a claim that such a suit constitutes a collateral attack on an order of the ICC. These questions, as the pleadings in the Section 10901 cases show, are also presented by the two petitions asking this Court to review the relationship between the labor and transportation statutes in Section 10901 sales cases. Sup. Ct. No. 87-1888, *Pittsburgh & Lake Erie R.R. v. RLEA*, Petition at 20-23; Sup. Ct. No. 87-2049, *RLEA v. Chicago & North Western Transportation Co.*, C&NW Response at 3.

Petitioners respectfully submit that the fact that this case arises under Section 11343, and not under Section 10901 as is involved in the line sale cases, is immaterial. What is relevant is that the ICC's basic justification for asserting that its authority is supreme over labor relations matters is the same in all transactions subject to its jurisdiction: *i.e.*, Congress, according to the ICC, has given that agency exclusive jurisdiction over all aspects of rail financial transactions subject to its regulation, including in particular, rail labor relations. *E.g.*, *FRVR Corporation—Exemption Acquisition And Operation*, ICC Finance Docket No. 31205, served January 29, 1988, slip op. at 8-9, *pet. for review pending*, 8th Cir. No. 88-1280 (reproduced in NRLC Brief as *amicus* in Sup. Ct. No. 87-1589, *Pittsburgh & Lake Erie R.R. v.*

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employees' collective bargaining rights, there can be no conflict between the ICC order and those rights to which Section 11341(a) would apply. *See, BLE v. ICC*, 761 F.2d 714, 725 (D.C. Cir. 1985), *vacated*, 482 U.S. ——, 96 L. Ed.2d 222 (1987).

RLEA, at 3a, 14a-16a); *MEC—Exemption From 49 U.S.C. 11342 and 11343*, ICC Finance Docket No. 30532, served September 13, 1985, at 6-7, *aff'd sub nom. RLEA v. ICC*, 812 F.2d 1443 (D.C. Cir. 1987) (table) (reproduced in ICC Appendix to Petition in Sup. Ct. No. 85-792, *ICC v. BLE*, at 40a, 48a-50a). Thus, it is apparent that if this Court were to conclude that the First Circuit was wrong in holding that Section 11341(a)'s immunity applied to rail exemptions, a resolution of the questions which will then be presented by this case—*i.e.*, the implied repeal and collateral attack issues—in the manner advocated by RLEA, will also resolve the Section 10901 sale cases.

Without belaboring this point much further, petitioners respectfully direct this Court's attention to the analysis employed by the United States District Court for the Northern District of Illinois in *Burlington Northern R.R. v. UTU*, N.D. Ill. No. 88 C 2687, decided June 9, 1988 (reproduced as the appendix to petitioners' Supplemental Brief). In that case, according to respondents, the court

> mistakenly believed that the question [presented by the Burlington Northern's reliance on an ICC exemption order of a Section 11343 transaction] was resolved by the Third Circuit's decision in *Pittsburgh & Lake Erie*, *supra*, . . . where in fact there was no question but that § 11341(a) was inapplicable because the transaction at issue [in *Pittsburgh & Lake Erie*] fell under § 10901 . . ., to which § 11341(a) does not apply.

GTI Brief at 17 n.17. While respondents are correct in observing that the *Burlington Northern* district court relied on the Third Circuit's decision in *Pittsburgh & Lake Erie* to support its conclusion that "unlike transactions subject to ICC approval under § 11343, Congress did not expressly provide that a § 10505 exemption relieves the involved carriers of any attendant statutory duties, such as their obligations under RLA" (Supp. Brief

in No. 87-1911 at 15a), the district court also relied upon the language of Section 11341(a) and two ICC decisions where the Commission expressly reached that conclusion in non-labor cases. But what respondents fail to appreciate about the district court's reliance on the *Pittsburgh & Lake Erie* decision, is that the Third Circuit's decision is highly relevant, for the impact of an exemption from regulation on a carrier's Railway Labor Act obligations should be the same, whether the exemption is from regulation under § 10901 or § 11343. Moreover, as the *Burlington Northern* decision goes on to show, the analysis performed by the Third Circuit in *Pittsburgh & Lake Erie*, as to whether the policies of both statutes should be enforced, is identical whether the rail financial transaction at issue is a § 10901 or a § 11343 transaction. Supp. Brief at 15a-20a.

Consequently, petitioners respectfully submit, respondents are incorrect in asserting that the issues presented by this case do not overlap with those presented in the Section 10901 sale cases, for they clearly do.[4]

II. On June 23, 1988, The Fifth Circuit Issued A Decision Which Followed The Third Circuit's Decision In *Pittsburgh & Lake Erie*, Concluding That The Railway Labor Act Was Enforceable, Notwithstanding An Order By The ICC Exempting A Rail Line Sale From Regulation

On June 23, 1988, the United States Court of Appeals for the Fifth Circuit issued its decision in *RLEA v. City*

[4] While petitioners agree with the State of South Dakota that the petitions in this case and in 87-2049 should be granted, petitioners again state that they suggest that the petitions in the *Pittsburgh & Lake Erie* cases be held in abeyance pending a ruling on the two RLEA petitions. One reason for not following the State of South Dakota's suggestion to grant the petitions in all four cases (South Dakota Memo. in No. 87-2049 at 3) is the confusion which will be caused by simultaneous briefing in the four cases. RLEA is the rail labor party in all four cases, and thus, it would be required to file opening and reply briefs in Nos. 87-2049 and 87-1911, and responsive briefs in Nos. 87-1888 and 87-1589.

of Galveston, 5th Cir. No. 87-6169, concluding that the Railway Labor Act could be enforced in a case involving a sale of rail assets and the lease of a rail operation subject to regulation by the ICC under Section 10901, but exempted from regulation by Section 10505. In reaching that conclusion, the appellate court relied heavily upon the Third Circuit's decision in *RLEA v. Pittsburgh & Lake Erie*, *supra*. While the Fifth Circuit's decision is relevant to the petitions for writs of certiorari in Nos. 87-2049 and 87-1888, it is also relevant to this petition because the analysis employed by that court to reach its decision, petitioners submit, is applicable to exempted Section 11343 transactions as well. Moreover, the Fifth Circuit's decision, when compared with the *Burlington Northern v. UTU* decision, *supra*, shows the unmistakable relationship between this case and Section 10901 cases. The Fifth Circuit's decision has been reproduced as Appendix I to this Brief.

CONCLUSION

For the reasons set forth herein, and in petitioners' other pleadings in this matter, petitioners respectfully request that this Court grant the writs as requested in this case and in No. 87-2049, *RLEA v. Chicago & North Western Transportation Co.*

Respectfully submitted,

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Date: June 28, 1988

APPENDIX

APPENDIX I

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-6169

RAILWAY LABOR EXECUTIVES ASSOCIATION, *et al.*,
Plaintiffs-Appellants,

versus

THE CITY OF GALVESTON, TEXAS,
acting by and through THE BOARD OF TRUSTEES
OF THE GALVESTON WHARVES,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas

(June 23, 1988)

Before RUBIN and POLITZ, Circuit Judges, and DUHE*, District Judge.

RUBIN, Circuit Judge:

Faced with operating losses, the port of Galveston, Texas, decided to sell its railroad assets and lease its railroad terminal facilities to a newly-formed rail company. The Interstate Commerce Commission, acting un-

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* District Judge of the Western District of Louisiana, sitting by designation.

der a procedure authorized by the Staggers Act of 1980, gave expedited approval to the sale/lease without imposing conditions to protect railway workers at the port. Executives of the unions representing the workers, however, sued to enjoin the transaction until Galveston had bargained over its effects as mandated by the Railway Labor Act of 1926. The district court refused to grant a preliminary injunction because such an order would impermissibly attack the ICC's approval of the transaction. Following the lead of the Court of Appeals for the Third Circuit in Railway Labor Executives Association v. Pittsburgh & Lake Erie Railroad Co.,[1] we hold that the injunction would not impermissibly contravene the Commission's approval and that the deregulatory provisions of the Staggers Act do not implicitly repeal the protections afforded workers in this context by the Railway Labor Act. We therefore reverse and remand for the district court to determine whether the Railway Labor Act requires that the injunction be issued.

I.

Galveston Wharves consists of extensive wharves and terminal facilities owned by the City of Galveston, Texas, and located at the entrance to Galveston Bay. Pursuant to Galveston's city charter, these operations are managed by the Wharves' Board of Trustees. For many years, Galveston Wharves has owned and operated a terminal railroad that runs five locomotives over 38 miles of track and employs about 85 persons. Galveston Wharves has a collective bargaining agreement with each of the railway labor organizations representing the various crafts and classes of railroad workers employed by it.

In 1985 and 1986, Galveston Wharves suffered economic losses that imposed a severe strain on its financial

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[1] No. 87-3797, —— F.2d —— (3d Cir. April 8, 1988), *pet. for cert. filed*, 56 U.S.L.W. 3839 (May 17 ,1988).

resources. Consequently, in March 1987 its management opened discussions with the unions in an effort to obtain substantial wage and workrule concessions. The discussions ended in May, without agreement.

After consultation with an investment banking firm, Galveston Wharves proposed to sell all of its railroad assets and to lease its terminal railroad facilities to a new firm, Galveston Railway, Inc. (GRI). On September 29, 1987, Galveston Wharves announced that it would proceed with these transactions unless the unions agreed to accept a 26.4 percent reduction in existing wages and benefits, a figure the investment firm had calculated would be necessary to achieve the same savings afforded by the lease agreement.

A month later, after the unions refused to make the concessions, Galveston Wharves' Board approved the documents required for the transactions. The lease, which is for a term of 10 years, provides that GRI will provide switching services at the Port of Galveston in accordance with Galveston Wharves' existing tariffs and contracts. Galveston Wharves reserves the right to manage and inspect the facilities and to approve in advance any changes in the tariffs.

On the same day, October 20, GRI filed a notice of exemption with the Interstate Commerce Commission, seeking an exemption from the provisions of § 10901 of the Interstate Commerce Act,[2] a section requiring a newly formed carrier that seeks to lease and operate an existing rail line to obtain prior approval of the Commission. GRI invoked the Commission's authority under § 10505 of the Act,[3] to exempt a transaction from the requirements of § 10901.

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[2] 49 U.S.C. § 10901.

[3] 49 U.S.C. § 10505.

In 1985, pursuant to this authority, the ICC in *Ex Parte No. 392* [4] had adopted a class exemption for substantially all § 10901 acquisitions and operations. Under the class exemption, such transactions automatically become effective seven days after notice is filed with the Commission unless a petition to revoke the exemption has been filed and granted or the Commission stays the transaction.[5] The Commission declined to impose employee-protective conditions on this class of transactions on the ground that [e]mployee protection "would discourage acquisitions and operations that should be encouraged" in order to eliminate lines that cannot operate economically.[6] The Commission stated that it was prepared to impose labor protection only in an "extraordinary case." [7]

After the ICC's approval of the sale/lease became effective, this suit was promptly filed by the Railway Labor Executives Association, an unincorporated association of the chief executive officers of the 19 labor organizations that collectively represent all of the organized railroad employees at Galveston Wharves as well as most of the organized rail employees in the United States. The Association contended that the sale/lease and Galveston Wharves' abrogation of its collective bargaining agreements with the unions constituted unilateral changes in existing agreements in violation of the Railway Labor Act,[8] which prohibits an employer from making unilateral changes in its employees' rates of pay, rules, and working conditions while the parties are

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[4] Ex Parte No. 392 (Sub-No. 1), Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. § 10901, 1 I.C.C.2d 810 (1985), *review denied as* Illinois Commerce Com'n v. I.C.C., 817 F.2d 145 (D.C. Cir. 1987).

[5] *Id.* at 816-17.

[6] *Id.* at 813.

[7] *Id.* at 815.

[8] 45 U.S.C. §§ 151-188.

complying with the Act's mandatory bargaining requirements.[9] The Association sought to enjoin Galveston Wharves from leasing the facilities and "from abrogating its collective bargaining agreements in violation of the mandatory requirements of the Railway Labor Act."

The district court issued a temporary restraining order prohibiting the transfer, but, after a hearing, the court dissolved the order on November 4. The court found that the sale or lease of the railroad property required authorization by the ICC; the Commission had approved the transaction; issuance of the injunction would forestall consummation of the sale and lease; and such an injunction would contravene and constitute an impermissible collateral attack on the order of the Commission. Under 28 U.S.C. §§ 2321 and 2342, the courts of appeals have exclusive jurisdiction to review ICC orders. The district court did not therefore reach the question whether Galveston Wharves had violated the Railway Labor Act.

The day after the district court's order, Galveston Wharves and GRI consummated the agreement, and Galveston Wharves discharged all of its railroad operating employees.

On appeal, we remanded to the district court for it to enter a statement of the factual bases on which it had concluded the facilities were rail lines subject to ICC jurisdiction. The district court having entered those findings, the case was resubmitted to this panel on the briefs originally filed and on letter briefs discussing the district court's supplemental findings of fact.

II.

The decision to grant or deny preliminary, as opposed to ultimate, relief involves a measure of discretion to be

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[9] 45 U.S.C. § 152 Seventh, § 156.

exercised by the district judge, and we will reverse only for abuse of discretion.[10] In reviewing the findings underlying the decision to grant or deny relief, however, we make the familiar distinction between factual determinations and legal conclusions, accepting the former unless they are clearly erroneous but exercising independent judgment concerning the latter.[11]

III.

The parties first dispute whether the ICC had jurisdiction over the Galveston facilities so as to authorize their sale and lease. The Interstate Commerce Act gives the Commission jurisdiction to approve and regulate acquisitions of "railroad line[s]" but exempts "spur, industrial, team, switching, or side tracks" located within a single state.[12] Whether a section of track is a rail line or a switching or spur track is a mixed question of law and fact on which we exercise independent review,[13] but the underlying facts found by the district court must be accepted, under Fed.R.Civ.P. 52(a), unless they are clearly erroneous.[14]

Whether a track is a rail line or switching or spur track turns on its use and intended use. As we declared in New Orleans Terminal Company v. Spencer:

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[10] Canal Authority of State of Florida v. Callaway, 489 F.2d 567, 572 (5th Cir. 1974) (*cited in* Mississippi Power & Light v. United Gas Pipe Line, 760 F.2d 618, 621 (5th Cir. 1985)).

[11] Gearhart Industries, Inc. v. Smith International, Inc., 741 F.2d 707, 710 (5th Cir. 1984); Apple Barrel Productions, Inc., 730 F.2d 384, 386 (5th Cir. 1984); *see also* In Re Fredeman Litigation, No. 87-2994, slip op. 3020, 3023 (5th Cir. April 15, 1988).

[12] 49 U.S.C. §§ 10901, 10907(b).

[13] *Compare* New Orleans Terminal Company v. Spencer, 366 F.2d 160, 164 (5th Cir. 1966); Illinois Commerce Com'n v. United States, 779 F.2d 1270, 1271 (D.C. Cir. 1985).

[14] *See also* Georgia Southern & Fla. Ry. Co. v. Duval Connecting R. Co., 324 F.2d 801, 802 (5th Cir. 1963).

> If there are traffic movements which are part of the actual transportation haul from shipper to consignee, then the trackage over which the movement takes place is a "line of railroad, or extension thereof." . . . If, however, the trackage is used in the loading, reloading, storage and switching of cars incidental to the receipt of shipments by the carrier or their delivery to the consignee, then such trackage is "spur, industrial, team, switching or side tracks" and as such, not under Commission jurisdiction.[15]

On remand from our previous order, the district court found that these rail facilities provide for the transportation of cargo between line-haul rail carriers and seagoing vessels engaged in interstate and foreign commerce and that they perform a function that is an integral and vital part of the through movement of goods in such commerce. The court found that the railroad serves as the agent for line-haul railroads and its charges are absorbed by the line-haul carriers. While this function is sometimes called "switching," it is not merely incidental to train movement; it is, the court found, "a necessary link in the transportation under the through bill of lading" [16] and hence "part of the actual transportation haul from shipper to consignee." [17] The district court concluded that, therefore, the line is a "rail line" and not a "spur track" or "switching track."

We accept the district court's findings of fact, for they are not clearly erroneous, and agree with its conclusion that the track in question is part of the actual transpor-

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[15] *New Orleans Terminal Company*, 366 F.2d at 165-66; *see also* Nicholson v. I.C.C., 711 F.2d 364, 367 (D.C. Cir. 1983).

[16] *See* Galveston Wharf Co. v. Galveston, Harrisburg & San Antonio Railway Co., 285 U.S. 127, 134, 52 S.Ct. 342, 344 (1932).

[17] *New Orleans Terminal Company*, 366 F.2d at 166.

tation haul and is therefore a railroad line. The Commission had jurisdiction to approve the sale/lease.

IV.

After we had heard oral argument, the Court of Appeals for the Third Circuit decided Railway Labor Executives Association v. Pittsburgh & Lake Erie Railroad Co.,[18] in which it considered each of the issues presented in this case. That opinion gives the history of the Railway Labor Act of 1926 [19] and of the Interstate Commerce Act as amended by the Railroad Revitalization and Regulatory Reform Act of 1976 [20] and, particularly, the Staggers Act of 1980.[21] In a thorough 60-page opinion, Judge Edward Becker reviewed the identical arguments made before us and held that the statutes amending the Interstate Commerce Act did not implicitly repeal the Railway Labor Act and did not authorize the ICC to exempt the sale of a railroad from the provisions of the RLA. In a discerning 10-page dissent, Judge William Hutchinson adopted a contrary view.

As the majority opinion in *Pittsburgh & Lake Erie Railroad* points out, the Railway Labor Act and the Interstate Commerce Act as amended by the Staggers Act reflect two different sets of Congressional policies and therefore make uncomfortable bedfellows. The Staggers Act evinces a concern "to eliminate the imposition of costly government-imposed conditions on otherwise efficient transactions, and, perhaps most importantly, to expedite the approval process so that efficient transactions are not derailed by regulatory red tape." [22] As part of the Staggers Act, Congress in 49 U.S.C. § 10505 granted the ICC broad authority to exempt rail trans-

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[18] No. 87-3797, —— F.2d —— (3d Cir. April 8, 1988).

[19] 45 U.S.C. §§ 151-188.

[20] Pub. L. No. 94-210, 90 Stat. 31.

[21] Pub. L. No. 96-448, 94 Stat. 1895, *reprinted in* 1980 U.S. Code Cong. & Admin. News 3998.

[22] *Pittsburgh & Lake Erie Railroad*, slip. op. at 35.

actions from the approval process, and the Commission has implemented this policy by the class exemption it granted to such transactions in *Ex Parte 392*.

The Railway Labor Act, on the other hand, "is expressly designed to delay certain management decisions, in order to give rail labor more leverage."[23] Such leverage includes the power of labor to obtain an injunction in federal court ordering management to maintain the status quo until the two sides have exhausted the extensive bargaining and mediation processes described in the Act.[24]

In the case before us, the district court concluded, citing the Second Circuit's decision in Railway Labor Executives Association v. Staten Island R.R.,[25] that to issue an injunction staying consummation of the sale/lease would constitute an impermissible collateral attack on the order of the ICC that authorized the transaction. Under 28 U.S.C. §§ 2321 and 2342, the courts of appeals have exclusive jurisdiction to review Commission orders.[26]

The Third Circuit in *Pittsburgh & Lake Erie Railroad* addressed this argument, rejecting it for two reasons that are fully applicable to this case:

> [First, t]he ICC approved this proposed sale under § 10901, which says that a transaction "*may*" proceed given a finding that the public interest "require[s] *or permit*[*s*]" the acquisition, 49 U.S.C. § 10901(a) (emphasis added). Thus, the ICC has made no finding that the public interest *requires* this transaction, that the transaction *must* proceed, or that a delay in (or even collapse of) the transaction would *harm* the public interest. Therefore, the dis-

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[23] *Id.* at 36.

[24] *See* 45 U.S.C. § 156; Detroit & Toledo S.L.R. Co. v. United Transportation Union, 396 U.S. 142, 149-51, 90 S.Ct. 294, 299-300 (1969).

[25] 792 F.2d 7 (2d Cir. 1986).

[26] *Id.* at 12.

> trict court's injunction does not conflict with the public interest as determined by the ICC's order, because the injunction merely granted a *delay* in the transaction, and the possibility that labor might win some protection for itself at the bargaining table.
>
> [Second,] the ICC merely refused to *impose* labor protective conditions on the transaction. . . . [T]he status quo injunction [would] not require any substantive protection for labor; it merely requires that the parties bargain, a process which may well produce no substantive agreement. . . . [B]argained-for concessions may be substantially less burdensome to the railroad than the typical substantive conditions imposed by the Commission. Put differently, the enforcement of the union's procedural rights should not be viewed as an attack on the ICC's determination that burdensome substantive protections would be detrimental to the public interest.[27]

The Third Circuit specifically considered the Second Circuit's decision in *Staten Island R.R.* and distinguished it as follows:

> The sale of the Staten Island Railroad was approved pursuant to § 10905, rather than § 10901. Section 10905 is a forced sale provision, requiring a financially ailing railroad to sell its assets to a financially responsible purchaser, as an alternative to abandonment of the line under § 10903. The ICC order in that case therefore stated that the seller "*must* complete the sale so long as the buyer consummates." 792 F.2d at 11 (emphasis added). The court therefore held that an injunction against sale could not be granted "without re[s]cission or modification of the ICC's order" . . .; such an attack, of course, would only be appropriate on direct appeal from the ICC order.

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[27] *Pittsburgh & Lake Erie Railroad*, slip. op. at 38, 41-42 (footnotes omitted).

> P&LE argues [as do amici in this case] that the distinction between a mandatory and permissive ICC order has been rejected by the Supreme Court in Venner v. Michigan Cent. R.R. Co., 271 U.S. 127 (1926). . . . The case, however, is inapposite, both because the requested injunction truly would have blocked the approved transaction as violative of state law, as opposed to merely delaying the transaction pending the exhaustion of bargaining, and because the case, at bottom, was a federal preemption case, declaring that *state* law could not be used to undermine a transaction once a federal law has preempted the field and a federal agency has passed on the very same issues.[28]

We adopt these views, recognizing, as did the Third Circuit, that a long delay occasioned by the RLA's bargaining process "could effectively kill the proposed transaction and ultimately push the railroad into a bankruptcy proceeding," [29] to the benefit of neither Galveston nor the unions and in derogation of both congressional intent and the ICC order. Because, however, "Congress has not updated . . . the RLA to keep it in tune with newer policies," to disallow the unions from seeking the injunction would effectively abrogate the RLA in this situation, since the Commission is not authorized to order the parties to commence RLA bargaining procedures and since labor protection is only one of fifteen factors the Commission is directed to consider in setting transportation policy.[30]

Like the Third Circuit, we cannot conclude that the Staggers Act "preempts"—that is, implicitly repeals—the RLA in this context. The Supreme Court has recently reemphasized that repeals by implication are disfavored and "when two statutes are capable of co-

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[28] *Id.* at 38-39 n.27 (some citations omitted).

[29] *Id.* at 39.

[30] *Id.* at 46-48; *see* 49 U.S.C. § 10101a.

existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."[31] Again we adopt the Third Circuit's detailed discussion of this issue, which the court summarized as follows:

> Dominating our thinking, however, is a reluctance to impinge on a congressional statutory mandate (the RLA) without a clear congressional authorization (and we find none), or to find an implied repeal of the requirements of the venerable Railway Labor Act without an unavoidable conflict between the mandates of the two statutes (and such a conflict is not ineluctable). See Watt v. Alaska, 451 U.S. 259, 266-67 (1981). We are particularly reluctant to find such a repeal here, where Congress has so recently addressed itself to deregulating the rail industry, yet has not chosen to relieve management of any of the onerous burdens imposed by the RLA. Moreover, because the Commission's approval of the transaction was merely permissive, we do not view an injunction against the sale as an attack on the ICC's order; and because the approval stemmed from a process in which labor's interests are only one of fifteen factors considered by the Commission, we do not believe that Congress intended that rail labor rely solely on the ICC for protection, to the exclusion of labor's rights under the RLA. For these reasons, we conclude that Congress did not intend the Commission's approval of the transaction without the imposition of substantive labor protective conditions to relieve the railroad of its obligation to comply with the exclusive congressionally-mandated RLA dispute resolution procedures.[32]

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[31] Traynor v. Turnage, —— U.S. ——, 108 S.Ct. 1372, 1381 (1988) (*quoting* Morton v. Mancari, 417 U.S. 535, 551, 94 S.Ct. 2474, 2483 (1974)).

[32] *Pittsburgh & Lake Erie Railroad*, slip op. at 6.

The Third Circuit's opinion then concludes:

> We are fully aware of the unfortunate ramifications and irony of our decision. A bargaining order, and a status quo injunction, designed to foster conciliation, promote labor peace, and ultimately keep the rails running, may ultimately have the perverse effect of destroying the only chance [the Railroad] has for survival and perhaps even the very jobs that the unions are now trying to protect. Although we are not happy with this result, we feel constrained to reach it, because the Supreme Court has appropriately admonished the judiciary not to apply its own brand of "common sense" in the face of a contrary statutory mandate. *See* TVA v. Hill, 437 U.S. 153, 193-95 (1978).
>
> We recognize, of course, that the statutory mandate is in tension with more recent congressional policies. However, we do not feel free to translate those abstract policies into a repeal of a black-letter law. If we have misinterpreted congressional intent, we can only hope that Congress speaks more clearly and consistently quite soon.
>
> We nevertheless will urge the National Mediation Board, to the extent it is within the Board's powers, to minimize the burden on the railroad, if possible. The Board's ultimate goal, of course, should be to promote conciliation and possibly agreement. Naturally, as long as this continues to be a reasonable possibility, the Board should conduct itself in the usual manner and refrain from releasing the parties from mediation. However, this need not become an "interminable" process. We would hope that the Board, in deference to the plight of the railroad, and to the competing congressional policy favoring expedited regulatory approvals, would streamline its procedures to the extent possible and not keep the parties in mediation any longer than

> absolutely necessary. When progress is no longer forthcoming, we would hope that the Board would release the parties, forthwith. In sum, it would seem that this case need not require the "purposely long and drawn out" approach of more typical major railway disputes, that such delay runs counter to the public interest, and, in fact, that congressional intent might well require something much more expeditious.[33]

We adopt these views. Although the Eighth Circuit has recently reached a contrary conclusion, holding that the Staggers Act implicitly repeals the Railway Labor Act in this context,[34] we find the Third Circuit's reasoning more persuasive. Accordingly, we reverse the district court order denying a preliminary injunction and remand the case to that court to determine, in accordance with this opinion, whether Galveston Wharves has violated the Railway Labor Act and an injunction should issue. Although the remaining issues may be pure questions of law, we do not wish to pass on them without the benefit of the district court's findings and conclusions. The ultimate grant or denial of an injunction may, of course, be the subject of a future appeal, and we therefore express no opinion concerning its merits. We do, however, urge the district court, should it grant injunctive relief, to fashion it in such a manner as to minimize the burden on Galveston Wharves, if possible.

The judgment of the district court is REVERSED and REMANDED for further proceedings consistent with this opinion.

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[33] *Id.* at 57-60 (footnotes, some citations omitted).

[34] Burlington Northern Railroad Co. v. United Transportation Union, No. 87-2581 (8th Cir. May 31, 1988); Railway Labor Executives Association v. Chicago and Northwestern Transportation Co., No. 87-5071 (8th Cir. May 31, 1988).

(3) (5)

Nos. 88-464 and 87-1911

Supreme Court, U.S.
FILED
SEP 30 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Petitioners,

v.

CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY, *et al.*,
Respondents.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Petitioners,

v.

GUILFORD TRANSPORTATION INDUSTRIES, INC., *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Courts of Appeals for the First and Seventh Circuits

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SUPPLEMENTAL BRIEF OF PETITIONERS

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Date: September 30, 1988

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

20pp

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RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
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On Petitions for Writs of Certiorari to the United States Courts of Appeals for the First and Seventh Circuits

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SUPPLEMENTAL BRIEF OF PETITIONERS

In May 1988, petitioners Railway Labor Executives' Association [hereinafter, "RLEA"] and fifteen (15) of its member organizations filed a petition with this Court for a writ of certiorari to the United States Court of Appeals for the First Circuit, asking this Court to review the judgment of the First Circuit in *RLEA v. Guilford Transportation Industries, Inc.*, 843 F.2d 1383 (1st Cir.

1988) (table). On September 16, 1988, petitioner RLEA and fourteen (14) of its member organizations filed a petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit, asking this Court to review the decision of that Court in *Chicago & North Western Transportation Company v. RLEA*, 7th Cir., No. 88-1504, decided August 23, 1988. This Supplemental Brief is respectfully submitted by petitioners pursuant to Rule 22.6 of the Rules of this Court to bring to this Court's attention certain recent developments affecting these cases.

I. No. 87-1911, *RLEA v. Guilford Transportation Industries, Inc.*

A. Status Of the Arbitrated Implementing Arrangement

On June 12, 1988, an arbitrator issued an award devising the implementing arrangement required by Article I, Section 4 of the employee protective provisions imposed by the Interstate Commerce Commission [hereinafter, "ICC" or "Commission"] as a condition of the lease exemptions which petitioners in No. 87-1911 are asserting were entered into by Guilford to avoid the carriers' Railway Labor Act obligations. *See, Delaware & Hudson Ry. —Lease and Exemption*, 4 I.C.C.2d 322 (1988). Respondents asserted that the obligations imposed upon them by that implementing arrangement may render rail labor's claims in the case before this Court moot by providing the same relief which petitioners are seeking through this case. Respondents' Brief in No. 87-1911 at 21. Rail labor recognized that the implementing arrangement may affect the justiciability of this case, but noted that it was too early to determine the impact of either that arbitration decision, or of another arbitration award, on the continued existence of a case or controversy in this case. Supplemental Brief at 5-6. Rail labor respectfully submits that it is still too early to predict the

actual impact of the arbitration awards, but at present those decisions, especially the arbitrated implementing arrangement, have not affected the continued existence of a live case or controversy here. Moreover, subsequent developments in the implementing arrangement matter have emphasized the pressing need for this Court to grant the petition in No. 87-1911.

After the petition was submitted to this Court for consideration at the end of last term, the ICC issued a decision on July 15, 1988, staying the arbitrated implementing arrangement, pending administrative review by the Commission of that decision. That stay order has been reproduced herein as Appendix A. Guilford's rail carriers[1] subsequently filed a petition with the ICC on July 25, 1988, asking the Commission to set that arbitration award aside; RLEA responded on September 2, 1988. Since the Commission stated that it will issue "a final decision in this proceeding . . . no later than 45 days after the record is complete" (Appendix A at 2a), it is probable that the commission will issue its ruling on Guilford's petition by October 17, 1988.[2]

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[1] The "Guilford rail carriers" as used herein, refers to the Boston and Maine Corporation, Maine Central Railroad Company, Portland Terminal Company, and Springfield Terminal Railway Company. The Delaware & Hudson Railway Company has not participated in the ICC proceedings since June 20, 1988, and it is not actively participating herein because it is currently in reorganization under Subchapter IV of Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 1161, *et seq.*, and is thus protected by the automatic stay of 11 U.S.C. § 362.

[2] On September 13, 1988, Guilford's rail carriers filed a motion with the ICC for leave to file a reply; that motion may extend the time in which the ICC will issue its decision, but such an enlargement, petitioners submit, appears unlikely.

B. Respondents, In Their Petition To The ICC To Set Aside The Arbitrated Implementing Arrangement, Have Admitted That They Entered Into The Leases To Evade Collective Bargaining Obligations

RLEA has asserted that this case, together with the two other petitions by RLEA in Nos. 88-464 and 87-2049, present the best vehicles of the many cases pending before this Court to resolve the important jurisdictional and conflict of laws issues arising from the ICC's and the railroads' contentions that the Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.*, preempts the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, and makes that labor statute unenforceable. Pet. in No. 87-1911 at 24-25; Pet. in No. 88-464 at 15-16. One of the reasons advanced by petitioners for that assertion as to the "cert-worthiness" of this case, was their observation that the issues in No. 87-1911 were not clouded by a factual dispute. Pet. in No. 87-1911 at 24-25.

As stated above, Guilford's rail carriers, except for the Delaware & Hudson Railway Company, filed a petition with the ICC on July 25, 1988, to set aside the arbitrated implementing arrangement. That petition, rail labor respectfully submits, contains several admissions which make rail labor's observation that there are no factual disputes as to the intent behind the leases crystal clear. For example, the Guilford rail carriers stated as follows in describing the leases:

> Through the lease transactions, several railway companies serving the New England freight market and facing extreme financial hardship were able to consolidate their services and offer more competitive pricing by lowering labor costs. These savings were to be accomplished not by reductions in force, but through the elimination of obsolete and costly work rules that had plagued the operation of the railroads.

Guilford Pet. to ICC, dated July 25, 1988 at vi. Similar statements were made throughout that pleading, for Guil-

ford argued that the arbitrated implementing arrangement should be set aside because, by requiring the Springfield Terminal Railway Company to honor the lessors' collective bargaining agreements, the arbitrator failed to abide by the ICC's charge to him; as the Guilford carriers stated:

> Because the Commission in its prior order did *not* intend that work rules from the leased lines be carried over wholesale to the ST operation, the arbitration award here must be vacated as incompatible with the Commission's order [served February 19, 1988].

Guilford Pet., *supra*, at 29 (emphasis in original).

Rail labor continues to maintain that the case in No. 87-1911 presents an excellent vehicle to address the relationship between the transportation and the labor statutes,[3] for the record in that case, together with the ICC's actions in dealing with the manner in which employees should be treated by these leases, show the need for judicial, as contrasted with ICC, enforcement of the commands of the labor statute. Guilford has been able for the past twenty-one months to use the ICC's exemption powers under 49 U.S.C. § 10505 to abrogate rail labor's collective bargaining agreements, but petitioners have been unable to obtain judicial consideration of their challenge to that abrogation of contractual and statutory rights because the courts have viewed this subject matter as having been committed by Congress to the jurisdiction of the ICC. That denial of a judicial forum has, in effect, made the transportation Act and its policies paramount to the Railway Labor Act and its policies, even though Congress intended the two statutory schemes to exist side-by-side.

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[3] It should be noted that a petition for a writ of certiorari was filed on September 26, 1988, in *City of Galveston v. RLEA*, Sup. Ct. No. 88-517. That petition raises the issue of collateral attack comparable to that raised by RLEA in No. 87-1911, but in a 49 U.S.C.

II. No. 88-464, *RLEA v. Chicago & North Western Transportation Company*

A. Respondent Chicago & North Western Transportation Company Has Invoked the Mediatory Jurisdiction Of The National Mediation Board

Subsequent to the filing of the petition for a writ of certiorari in No. 88-464, *RLEA v. Chicago & North Western Transportation Company*, respondent Chicago & North Western Transportation Company [hereinafter, "C&NW], filed sixteen (16) applications with the National Mediation Board [hereinafter, "NMB"] for mediation under Section 5 First of the Railway Labor Act, 45 U.S.C. § 155 First. Those applications were filed on September 23, 1988, and requested that the Board mediate the disputes between rail labor and the C&NW growing out of the notices which petitioners in No. 88-464 had served upon the C&NW under Section 6 of the Railway Labor Act, 45 U.S.C. § 156, to negotiate agreements for employees affected by the Duck Creek South line sales. Respondent C&NW, however, stated in its cover letters to its applications for the Board's mediatory services that:

> The Carrier has and still does contest the validity of these [Section 6] notices and invokes the services of the National Mediation Board without waiving its objections to the validity of these notices.

E.g., letter from Ronald J. Cuchna, C&NW Vice President-Labor Relations, to C.R. Barnes, NMB Executive Director, dated September 22, 1988 involving Brotherhood of Maintenance of Way Employes.

Those requests for mediation were docketed by the NMB on September 23, 1988, as NMB Case Nos. A-12051 through, and including, A-12066. When it docketed those requests, the NMB sent a letter to each organization

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§ 10901 sale case similar to those pending in Sup. Ct. Nos. 87-2049 and 87-1888.

requesting comments. One of those letters is reproduced herein as Appendix B. In addition, the NMB stated that: "The parties are reminded of the status quo provisions of the Railway Labor Act." [4] Appendix B at 9a.

CONCLUSION

Petitioners respectfully submit that this Court should grant the writs in these cases. Moreover, petitioners continue to maintain that this Court should grant the writ in No. 87-2049, *RLEA v. C&NW*, which, when combined with the issues presented by these cases, should present the crucial issues in a manageable manner.

Respectfully submitted,

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1050 17th Street, N.W.
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Attorneys for Petitioners Railway Labor Executives' Association, et al.

Date: September 30, 1988

* Counsel of Record

---

[4] By quoting that admonition by the NMB, petitioners do not intend to convey the impression that this statement has any binding force on either party, for this Court has observed that: "[T]he Mediation Board has no adjudicatory authority with regard to major disputes, nor has it a mandate to issue regulations construing the [Railway Labor] Act generally." *Detroit & Toledo Shore Line R.R. v. UTU*, 396 U.S. 142, 158-59 (1969).

APPENDICES

APPENDIX A

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 30965 (Sub-No. 1)

DELAWARE AND HUDSON RAILWAY COMPANY—
LEASE AND TRACKAGE RIGHTS EXEMPTION—
SPRINGFIELD TERMINAL RAILWAY COMPANY

REVIEW OF ARBITRAL AWARD

DECISION NO. 2

Decided: July 8, 1988

Service Date: July 15, 1988

On June 22, 1988, Boston and Maine Corporation (B&M) and Maine Central Railroad Company (MEC) filed a petition for stay of an arbitrator's award issued pursuant to our decision in *D&H Ry.—Lease and Trackage Rights Exempt.—Springfield Term.*, 4 I.C.C.2d 322 (1988) (*Springfield Terminal*),[1] pending administrative review of the award.[2] The decision, unless stayed, becomes effective July 12, 1988. Portland Terminal Company (PT) and Springfield Terminal Railway Company (ST) indicated on June 23, 1988, that they join in the petition for stay.[3] On June 29, 1988, the Railroad [sic] Labor Executives' Association (RLEA) filed a reply in opposition to the railroads' petition for stay. The B&M, MEC,

[1] That proceeding embraced 17 additional notices of exemption.

[2] The carriers' petition for administrative review is due July 25, 1988.

[3] The Delaware and Hudson Railway Company (D&H), a party to the *Springfield Terminal* proceeding, filed a petition for reorganization under Chapter 11 of the Bankruptcy Code on June 20, 1988, and has not joined in the petition for stay.

ST and PT (herein "the GTI carriers" or "GTI") filed a motion for leave to file a sur-reply and a sur-reply on July 6, 1988. In the interest of obtaining the benefits of all arguments, the motion to file the sur-reply will be granted. *See* Finance Docket No. 28583 (Sub-No. 24), *Burlington Northern Inc.—Control and Merger—St. Louis-San Francisco Railway Co.*, served June 23, 1988, at 1. The petition for stay will be granted. We will expedite our consideration of GTI's petition for administrative review of the arbitral award, and a final decision in this proceeding will be issued no later than 45 days after the record is complete.

The decision in *Springfield Terminal* directed the parties to negotiate an implementing agreement for a series of lease transactions involving the rail carrier subsidiaries of Guilford Transportation Industries, Inc. (GTI), and, if an agreement could not be reached through negotiation, to submit the matter to arbitration. The parties' dispute was eventually submitted to an arbitrator, and an arbitral award was issued June 12, 1988.[4] The implementing agreement imposed by the award would require ST to apply the rates of pay, rules, and working conditions formerly required by the lessor carriers' collective bargaining agreements to its operations on the GTI system.

The decisions of arbitrators who resolve disputes arising out of labor protective conditions imposed by this Commission are treated as decisions of the Commission. *See United Transp. Union* v. *Norfolk & Western Ry.*, 822 F.2d 1114 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 700 (1988). We have noted that arbitrators' decisions are not final orders and are subject to administrative review by this agency. *See* Docket No. AB-1 (Sub-No. 83), *Chicago & North Western Transportation Co.—Abandonment*, 3 I.C.C.2d 729 (1987) (*Lace Curtain*).

[4] The GTI carriers received a copy of the award on June 15, 1988.

In our decision in *Springfield Terminal*, we expressly stated that we would review any appeals from any arbitration decisions rendered pursuant to our directive that the parties negotiate an implementing agreement or, failing agreement, submit the matter to arbitration. Since the Commission in *Springfield Terminal* expressly provided that we would review an arbitrator's decision, the grant of a stay pending such review is particularly appropriate. The position of the petitioners is analogous to parties filing administrative appeals of right under 49 CFR 1115.2, where the timely filing of an appeal to an initial decision automatically stays its effect pending the appeal. In deciding the petition for stay, the guidelines set forth in *Washington Metropolitan Area Transit Commission* v. *Holiday Tours Inc.*, 559 F.2d 841 (D.C. Cir. 1977) have nevertheless been followed and applied to determine that the arbitrator's decision should be stayed pending appeal.

Petitioners B&M and MEC represent that the implementation of the arbitrator's decision, including the implementation of the B&M and MEC collective bargaining agreements in lieu of the agreements currently in effect on the ST system, would jeopardize the viability of their lines. In support, the GTI cites the recent bankruptcy and cessation of service of the Delaware & Hudson Railway Company (D&H), a GTI subsidiary. We precluded the D&H from leasing its lines to ST and it has remained subject to its existing collective bargaining agreement. In reply, RLEA argues that the GTI petitioners have not supported their allegations of irreparable harm, noting that the B&M and MEC were able to operate under existing work rules in the past. In addition, RLEA argues that the GTI carriers willingly accepted the obligation to comply with the arbitrator's award because they consummated the leases of the lines to ST before we ruled on the petitions filed by RLEA and others to revoke the class exemption pursuant to which the lease transactions were made.

The GTI petitioners argue that granting a stay will not irreparably harm other parties, *i.e.*, the employees affected by the arbitrator's decision, since interest will accrue on their claims for money damages and that those damages will continue to accrue during the pendency of the appeal should the GTI petitioners fail to prevail. By contrast, GTI would have no way to be compensated for expenses it incurred pursuant to the arbitrator's decision should it be reversed on appeal.

RLEA argues that the harm which would occur to the employees from a delay in implementing the arbitrator's award would outweigh any harm that would be incurred by GTI. Specifically, RLEA states that "it is impossible at a later date to undo the numerous and varied exercises of options which employees must exercise to earn a livelihood." RLEA notes that, at present, GTI is reinstating employees pursuant to a separate arbitration award concluding a dispute over safety practices on the carrier. RLEA states that reinstating these employees on a basis other than the seniority system established by the arbitrator would compound "an already highly inequitable, dangerous and harmful situation."

Both sides argue that the balance of equities and consideration of the public interest favor their positions.

In deciding whether to grant the stay, the Commission is charged, as the parties note, not only with balancing the equities affecting the parties but also with considering the effect of our action on the general public. Rail service in New England on the Guilford system has been in turmoil for some time. In our decision in *Springfield Terminal*, we sought to establish a procedure that would not only resolve the conflicting claims but would also provide a basis for the establishment of stable and dependable rail service for New England. While it is premature to state whether or not the Commission will overturn the award in reponse to GTI's appeal of the arbitrator's de-

cision, GTI has raised difficult and substantial legal issues and, therefore, a stay is warranted. If the appeal should be granted, failure to stay the arbitration decision would have created a situation where substantial changes made pursuant to the leases implemented under the class exemption were undone by the arbitrator's decision and were then reimposed. Those gyrations might be sufficient to reduce an already difficult situation to chaos. If the appeal is ultimately denied, the return to the B&M and MEC collective bargaining agreements can be implemented then, with no more and hopefully less friction than doing so now, since the GTI carriers would have had time to plan for the possible implementation of the arbitrator's award.

In addition, the allegation of the GTI carriers that the implementation of the award could impair their visibility and jeopardize service to shippers cannot be ignored. The bankruptcy of the D&H and its cessation of service, while not dispositive of the situation on the B&M and MEC, offers some parallels. It also offers the reminder that rail service can cease and its cessation can harm the public. If the GTI carriers are to be believed, this may happen anyway if the appeal is denied. However, as long as there is the possibility that the award may be overturned, the Commission should seek to avoid irreparable harm to public as well as private interests unless the harm to the interests affected by implementing the stay is more substantial. A delay in the implementation of the arbitrator's decision will chiefly result in an economic burden on the affected employees. While this harm is significant, it is, as the courts have found in upholding this Commission's *Mendocino* labor protective conditions,[5] compensable

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[5] *Aff'd sub nom. Railway Labor Executives' Association* v. *United States*, 675 F.2d 1248 (1982), *See* Finance Docket No. 30532, *Maine Central R R., et al.—Exemption* (not printed), served September 13, 1985, *aff'd sub nom. Railway Labor Executives' Association* v. *ICC*, No. 85-1636 (D.C. Cir. March 16, 1987).

through reparations. This reparable injury does not outweigh the public's interest in the maintenance of reliable rail service in New England.

The U.S. Court of Appeals for the D.C. Circuit discussed the significance of the consideration of the public interest in *Virginia Petroleum Jobbers Ass'n* v. *FPC*, 259 F.2d 921, 925 (D.C. Cir. 1985) in stating:

> Where lies the public interest? In litigation involving the administration of regulatory statutes designed to promote the public interest, this factor necessarily becomes crucial. The interests of private litigants must give way to the realization of public purposes.

It is a "fundamental principle * * * that where Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy 'the relation of remedy to policy is peculiarly a matter for administrative competence.'" *American Power and Light Co.* v. *SEC*, 329 U.S. 90, 112 (1946), quoting *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 117, 194 (1941). *See also Atchison, Topeka and Santa Fe Railway Co.* v. *Wichita Board of Trade*, 412 U.S. 800, 825 (1973).

On balance, the competing equities of the private parties and the consideration of the public interest support the grant of a stay pending administrative review by this agency of the arbitrator's decision.

This decision will not significantly affect either the quality of the human environment or energy conservation.

It is ordered:

1. The arbitral award is stayed pending administrative review by the Commission.

2. This decision is effective on the dated served.

By the Commission, Chairman Gradison, Vice Chairman Andre, Commissioners Sterrett, Simmons, and Lamboley. Commissioner Sterrett dissented and would have granted only a housekeeping stay until August 1, 1988, to evaluate whether a further stay would be appropriate in light of the carriers' petition to be filed by July 25, 1988. Commissioner Lamboley dissented with a separate expression.

[SEAL]

NORETA R. MCGEE
Secretary

COMMISSIONER LAMBOLEY, dissenting:

Given the relevant circumstances in this proceeding, I would not grant the request for stay.

APPENDIX B

NATIONAL MEDIATION BOARD
Washington, D.C. 20572

September 23, 1988

Case No. A-12059

Mr. Ronald J. Cuchna
Vice President-Labor Relations
Chicago and Northwestern Transportation Co.
One North Western Center
Chicago, IL 60606

Mr. Geoffrey N. Zeh, President
Brotherhood of Maintenance of Way Employes
12050 Woodward Avenue
Detroit, MI 48203

Gentlemen:

The Board is in receipt of an application for mediation from the Chicago and Northwestern Transportation Company covering a dispute between that Carrier and the Brotherhood of Maintenance of Way Employes, on the following subject:

> "The organization's demands for various forms of protective benefits for employees affected by sale of line segments."

Mr. Zeh is requested to furnish this office promptly with any statement he may care to make on behalf of the Organization.

This application has been docketed as our Case No. A-12059 and will hereafter be referred to by that number. A mediator will be assigned to mediate this dispute consistent with prior commitments.

The parties are reminded of the status quo provisions of the Railway Labor Act.

Sincerely,

/s/ Charles R. Barnes
CHARLES R. BARNES
Executive Director

CRB/ljb

(8) (11) (6) (3) (5)

Nos. 87-1589, 87-1888, 87-1911, 87-2049 and 88-464

Supreme Court, U.S.
FILED
NOV 18 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PITTSBURGH & LAKE ERIE RAILROAD COMPANY,
Petitioner,

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Respondents.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Petitioners,

v.

GUILFORD TRANSPORTATION INDUSTRIES, INC., *et al.*,
Respondents.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Petitioners,

v.

CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Courts of Appeals for the First, Third, Seventh and Eighth Circuits

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SUPPLEMENTAL BRIEF FOR RAILWAY LABOR EXECUTIVES' ASSOCIATION

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Railway Labor Act, 45 U.S.C. § 151, *et seq.* ..... *passim*

Rules of the Supreme Court

Rule 22.6 1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

Nos. 87-1589, 87-1888, 87-1911, 87-2049 and 88-464

PITTSBURGH & LAKE ERIE RAILROAD COMPANY,
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v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
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GUILFORD TRANSPORTATION INDUSTRIES, INC., *et al.*,
Respondents.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
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v.

CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Courts of Appeals for the First, Third, Seventh and Eighth Circuits

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SUPPLEMENTAL BRIEF FOR RAILWAY LABOR EXECUTIVES' ASSOCIATION

This supplemental brief is respectfully submitted by the Railway Labor Executives' Association [hereinafter, "RLEA"], pursuant to Rule 22.6 of the Rules of this Court, to present an overview of the pending petitions,

and in response to certain arguments made by the United States as an *amicus curiae* in Nos. 87-1589 and 87-1888, *Pittsburgh & Lake Erie R.R. v. RLEA*. This brief is also being submitted to bring to this Court's attention certain recent developments affecting No. 87-1911, *RLEA v. Guilford Transportation Industries, Inc.*

1. OVERVIEW OF PENDING CASES

Since March 24, 1988, when the petition for a writ of certiorari was filed in No. 87-1589, *Pittsburgh & Lake Erie R.R. v. RLEA*, a total of eight (8) petitions have been filed with this Court seeking writs of certiorari for this Court to review various issues arising from the rail industry's reliance upon the powers of the Interstate Commerce Commission [hereinafter, "ICC" or "Commission"] over rail financial transactions, to assert that the Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.*, relieves our nation's railroads of their bargaining and status quo obligations under the Railway Labor Act, 45 U.S.C. § 151, *et seq.* While those petitions raise many different issues, RLEA, which is a party to each case, submits that the cases may be grouped into the following four categories by the issues which they present.

A. Collateral Attack Issues

Although the railroads have asserted throughout this litigation that the Interstate Commerce Act operates to relieve them of any "overlapping" obligation under the Railway Labor Act, the courts first relied upon the collateral attack concept to deny rail labor's efforts to enforce the Railway Labor Act's notice, bargaining and status quo commands. *E.g., RLEA v. Staten Island R.R.*, 792 F.2d 7 (2d Cir. 1986), *cert. denied*, 479 U.S. 1054 (1987). That collateral attack issue is currently before this Court in five (5) of the eight petitions: No. 87-1888, *Pittsburgh & Lake Erie R.R. v. RLEA*; No. 87-1911, *RLEA v. Guilford Transportation Industries, Inc.*; No. 87-2049, *RLEA v. Chicago & North Western Transpor-*

tation Co.; No. 88-217, *ICC v. Pittsburgh & Lake Erie R.R.*; and No. 88-517, *City of Galveston v. RLEA.*

Of those five cases, RLEA submits that the *Guilford* case presents the best vehicle, for *Guilford* presents the collateral attack issue in a factual situation where the ICC imposed employee protections which the carriers asserted specifically authorized them to consummate the leases, notwithstanding the bargaining and status quo commands of the Railway Labor Act. *See, BLE v. Boston and Maine Corp.*, 788 F.2d 794, 800-01 (1st Cir.), *cert. denied*, 479 U.S. 829 (1986). This case, therefore, presents not only the general collateral attack issue which arises when rail labor seeks to enforce the Railway Labor Act in cases involving ICC orders exempting a financial transaction, but the additional question of whether the imposition of employee protections requires a different result. This additional issue is highly relevant because some courts have relied upon the presence of ICC imposed protective conditions to conclude that enforcement of the Railway Labor Act's major dispute resolution processes would constitute a collateral attack on an ICC decision imposing specific conditions to protect employee interests. *BLE v. Boston and Maine Corp.*, *supra*, 788 F.2d at 800-02; *see*, ICC Pet. in No. 88-711 at 14-15. Thus, if this Court resolves the collateral attack issue presented by the pending petitions in a manner favorable to rail labor, but in a case in which employee protections were not imposed by the ICC, it is safe to assume that the ICC will then impose some minimal form of protection, such as the limited buyout offer involved in No. 88-464, *RLEA v. Chicago & North Western Transportation Co.*, and the courts will then be faced with the question of whether that fact makes enforcement of the Railway Labor Act a collateral attack on that ICC order.

In short, since the goal which the parties to the pending petitions are attempting to obtain is the final reso-

lution of as many vexing issues as possible, RLEA respectfully submits that *Guilford* should be one of the cases accepted for review.

In its brief to this Court as an *amicus* in Nos. 87-1589 and 87-1888, however, the United States asserts that it disagrees with RLEA that the *Guilford* case should be used as a vehicle to resolve any of the pending issues. U.S. Brief at 9 n.8. The United States takes that position because it assumes that the transactions in *Guilford* are subject to the express immunity granted by 49 U.S.C. § 11341(a) that, according to the Solicitor General, relieves a carrier participating in such "approved or exempted" transactions from any restraining or prohibitory law. *Id.* As the United States concludes: "Thus, the principles that govern transactions subject to Section 11341 are not necessarily applicable to transactions subject to Section 10901 and the *Ex Parte No. 392* class exemption." *Id.*

In asserting that Section 11341(a) applies to the lease *exemptions* involved in *Guilford*, the United States ignores the fact that Section 11341(a), by its express terms, applies only to "transaction[s] approved by or exempted by the Commission under this subchapter [*i.e.*, Sections 11341 to 11351] . . . ." 49 U.S.C. § 11341(a). Rail exemptions, such as those involved in *Guilford*, are granted under Section 10505, a section which is in an entirely different subchapter of the transportation statute. Moreover, as RLEA pointed out in its petition in No. 87-1911 (Pet. at 22-23), the import of the clear language of Section 11341(a) is supported by that section's legislative history, and by the ICC's holding in *Ex Parte No. 282 (Sub-No. 9), Railroad Consolidation Procedures—Trackage Rights Exemption*, 1 I.C.C.2d 270, 279 (1985), that: "[S]ection 11341(a) does not apply to the [Section 11343(a)] transactions exempted" under Section 10505.

Once it is accepted that Section 11341(a) does not apply to the lease exemptions in *Guilford*, that case then

presents the same collateral attack and conflict of laws issues as are involved in the other cases, except, as explained above, it has the additional feature of the impact of ICC imposed protections on both issues. Therefore, RLEA submits, Guilford should be used as one of the vehicles to resolve both the collateral attack and conflict of laws issues.

RLEA recognizes, however, that the possibility exists that this Court may not agree with RLEA's view of the law on the collateral attack issue, and therefore, RLEA agrees with the rail industry that at least one of the other pending collateral attack cases should also be accepted for review in the event that this Court concludes that the presence of employee protective provisions requires a different result than RLEA is advocating. As we have explained before, RLEA submits that its petition in No. 87-2049, *RLEA v. Chicago & North Western Transportation Co.*, should be that additional vehicle.

No. 87-1888 also presents a good vehicle for the non-employee protection collateral attack issue, but it suffers from one major defect.[1] Rail labor has been involved in negotiations with the Pittsburgh & Lake Erie Railroad [hereinafter, "P&LE"] and its creditors in an attempt to find a solution to the carriers' financial plight. So far, those negotiations have been unsuccessful. However, as shown by the letter to counsel for RLEA from RLEA's financial advisor, Mr. Brian M. Freeman, which has been lodged with this Court, it is possible that those efforts will be successful in the near future. A successful resolution of the current negotiations may include as part of the agreement the commitment of all parties (including RLEA and the P&LE) to dismiss "with prejudice" "all

[1] As explained below, RLEA's hesitancy to recommend the grant of the petition in No. 87-1888 lies in the possibility that the parties may agree to settle before this Court reaches a decision on the merits. That possibility, however, is far from a certainty, and, thus, this Court may wish to grant the petition in No. 87-1888, as well, for concurrent briefing with Nos. 87-1911, 87-2049, and 88-464.

actions brought by Rail [*sic*] Labor Executives' Association ('RLEA') against PLE relating to the sale of PLE's assets . . . ." Freeman letter dated November 14, 1988 at attachment, p. 9, ¶(g).

It was for this reason that RLEA stated in its response to the P&LE's petition in No. 87-1888, that "there is a substantial question as to whether this case will still present a justiciable issue later this year or early next year." RLEA Brief in No. 87-1888 at 5.[2] While RLEA continues to question whether this case will remain viable, we agree that it is currently justiciable. However, while RLEA has a clear interest in continuing to press the validity of the Third Circuit's decision, RLEA also has an obligation to the P&LE rail employees which may require it to agree to dismiss its underlying complaint as a condition for an overall settlement. That same possibility does not exist in No. 87-2049 or in No. 87-1911.

In short, on the collateral attack issue, RLEA suggests that this Court grant the petitions in Nos. 87-1911 and 87-2049, and that this Court hold Nos. 87-1888 and 88-517 in abeyance. *But see*, note 1, *supra*. RLEA continues to maintain that No. 88-217 should be denied.

B. Conflict Of Laws Issues

RLEA respectfully submits that the issue which lies at the heart of the pending cases, although it is not presented in each petition, is the question of whether the Interstate Commerce Act supersedes the Railway Labor Act. That issue is squarely presented by five of the peti-

[2] In its brief (U.S. Brief at 9 n.8), the United States asserts that RLEA has suggested that No. 87-1888 may become moot because the P&LE no longer intends to sell to its original prospective purchaser, P&LE Railco, Inc. That assertion is incorrect, for RLEA has contended before, and continues to assert, that this case (No. 87-1888) will not be moot so long as the P&LE may sell its assets before it has completed the Railway Labor Act's major dispute resolution processes. *See, RLEA v. P&LE*, 845 F.2d 420, 427-28 n.8 (3rd Cir. 1988), *pets. for cert. pending*, Nos. 87-1888 and 88-217.

tions: No. 87-1888, *P&LE v. RLEA*; No. 87-1911, *RLEA v. Guilford*; No. 87-2049, *RLEA v. Chicago & North Western*; No. 88-217, *ICC v. P&LE*; and No. 88-711, *ICC v. UTU*. Of those five cases, Nos. 88-217 and 88-711 do not merit review by this Court since the ICC, which is the petitioner in both, lacks standing. Of the remaining three, RLEA again suggests that Nos. 87-1911 and 87-2049 be used as the test vehicles.

C. Railway Labor Act Issues

Running throughout virtually all of these cases is the question of what specific Railway Labor Act obligations are presented and believed by the rail carriers to be in conflict with the Interstate Commerce Act. Only two of the pending cases, besides the ICC's petition in No. 88-217, present that question: No. 87-1888, *P&LE v. RLEA*, and No. 88-464, *RLEA v. Chicago & North Western Transportation Company*. However, a primary distinction between those two cases is that the *Chicago & North Western* case deals with a sale of part of a railroad, and thus, does not present the same bargaining issue which arises from the fact that the *P&LE* case involves a railroad's attempt to go completely out of the railroad business.[3] While RLEA submits that this fact should not make any difference, the Seventh Circuit in the *Chicago & North Western* case concluded that this was a distinguishing factor. *See*, No. 88-464, Pet. at 16a-17a n.3. Thus, if this Court is to resolve as many issues as possible so that rail labor and management will know what their rights are in line sale cases, this Court should grant the petition in No. 88-464.

Another reason for granting the petition in No. 88-464 is that this case is the only one of the eight petitions which squarely presents the recently prevalent "minor

[3] It should be noted that the P&LE did not intend to dissolve, but simply to sell its rail lines and facilities and remain viable as a rail car leasing and real estate entity.

dispute" question. Since the contractual provisions upon which the C&NW relied in No. 88-464 to argue that the underlying controversy was a minor dispute, are common contractual provisions throughout the entire rail industry (*see*, RLEA Reply Brief in No. 88-464 at 6 n.1), it stands to reason that other carriers will advance an identical minor dispute defense in line sale cases. Indeed, this has already occurred, for in the two remaining district court cases arising from line sales, the carriers have raised that identical argument. One case is still pending, *RLEA v. Burlington Northern R.R.*, W.D.Mo. Civil Action No. 87-0696-CV-W-8, but in the other, the court relied upon the Seventh Circuit's *Chicago & North Western* decision to conclude that rail labor's claims raised only a minor dispute, even though Section 6 notices had been served by several unions. *Atchison, Topeka & Santa Fe Ry. v. RLEA*, N.D.Ill Civil Action Nos. 87 C 9847 and 87 C 9969, decided October 25, 1988.

A resolution of the question presented as to the scope of the status quo obligation is important to the conflict of laws issue. This is so because, obviously a conclusion that a carrier has an obligation to bargain over the effects of a sale on its employees, but that it is not precluded by the Act's status quo obligation from selling during that bargaining process, presents a different conflict issue than would be presented by the conclusion that the status quo obligation *does* preclude the sale before that bargaining is completed. Since No. 88-464 presents this issue, RLEA submits that the writ should be granted in that case.

D. Norris-LaGuardia Act Issue

Two of the pending cases present the additional issue of the relationship between the Interstate Commerce Act and the Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.* Those cases are: No. 87-1589, *P&LE v. RLEA*, and No. 88-711, *ICC v. UTU*. One of those cases, *ICC v. UTU*, does not present a case over which this Court has juris-

diction, and the other case suffers from the possible settlement problems inherent in No. 87-1888. RLEA has previously suggested that this Court hold No. 87-1589 in abeyance, and it continues to make that suggestion for the reasons set forth in its response to No. 87-1589.

2. RECENT EVENTS AFFECTING NO. 87-1911

In its earlier supplemental briefs in No. 87-1911, RLEA informed this Court that on June 12, 1988, an arbitrator issued an award which may affect the continued justiciability of No. 87-1911. That award—the Implementing Agreement award—is the subject of a review petition before the ICC. On November 15, 1988, the ICC conducted a public voting conference on that petition, and three of the five Commissioners voted to set aside that award insofar as it required the Springfield Terminal Railway Company to apply the rates of pay and work rules of the lessor carriers to the employees operating the leased lines. According to the statements made by the Commissioners at the voting conference,[4] they voted to set aside that portion of the award because the arbitrator's award limited the "management flexibility" which Guilford had hoped to achieve by the leases. As RLEA explained in its Supplemental Brief of September 30, 1988, at 4-5, that management flexibility was to be achieved through the abrogation of the lessors' collective bargaining agreements. However, rather than impose the Springfield Terminal work rules, the ICC voted to require the parties to negotiate, with the arbitrator acting as a mediator, the issue of the proper construction of the Springfield Terminal-United Transportation Union collective bargaining agreement, and the issue of what work rules should govern the lease operations. If the parties are unable to agree, then the "arbitrator"

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[4] RLEA has ordered a transcript of the voting conference and once it is obtained (at present, it is scheduled to be delivered on Monday, November 21, 1988), RLEA will lodge it with this Court.

is to submit to the Commission a recommended decision on those issues which the ICC will then review to devise the new collective bargaining "agreement." RLEA recognizes, however, that the full import of what the Commission will order in that case will not be known until it issues it written decision and order.

CONCLUSION

For the reasons set forth in RLEA's earlier pleadings, RLEA respectfully submits that this Court should grant the petitions in Nos. 87-1911, 87-2049 and 88-464.

Respectfully submitted,

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No. 87-1911

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Petitioners,

v.

GUILFORD TRANSPORTATION INDUSTRIES, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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FOURTH SUPPLEMENTAL BRIEF FOR PETITIONERS

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

FOURTH SUPPLEMENTAL BRIEF FOR PETITIONERS

While petitioners Railway Labor Executives' Association [hereinafter, "RLEA"] and the fifteen (15) individual petitioning labor organizations are reluctant to file yet another supplemental brief in this case, petitioners must bring to this Court's attention a decision by the United States Court of Appeals for the Seventh Circuit in *Burlington Northern R.R. v. UTU*, 7th Cir. Nos. 88-2180 and 88-2181, decided November 18, 1988. A copy of that decision is attached hereto as Appendix A. That decision affirmed in part the decision of the United States District Court for the Northern District of Illinois which

petitioners brought to this Court's attention in their first supplemental brief, filed June 20, 1988, but vacated the lower court's order and remanded for formulation of a preliminary injunction consistent with its decision.

Burlington Northern* Is In Square Conflict With *Guilford

Like the situation presented in *RLEA v. Guilford Transportation Industries, Inc.*, 1st Cir. No. 87-1774, decided January 20, 1988, *pet. for cert. pending*, No. 87-1911, the *Burlington Northern* case involved a carrier's use of the Interstate Commerce Commission's [hereinafter, "ICC" or "Commission"] exemption procedures under 49 U.S.C. § 10505 to avoid its collective bargaining obligations under the Railway Labor Act, 45 U.S.C. § 151, *et seq.* The district court in the *Burlington Northern* case concluded that it had jurisdiction to enforce the Railway Labor Act and enjoined the Burlington Northern from "commencing operations" pursuant to the ICC exempted transaction until it had complied with the Railway Labor Act. Supp. Brief, filed June 20, 1988, at 21a-22a. On appeal, the Seventh Circuit agreed with the district court that the federal courts had jurisdiction to enforce the Railway Labor Act, but unlike the district court, the appellate court concluded that the labor statute could be enforced without involving a conflict with the transportation statute. App. A at 25a-26a.

As the appellate court summarized (App. A at 30a):

> [W]e conclude that a dispute resulting from a rail trackage rights agreement where a carrier leases trackage rights to a wholly owned, completely dependent subsidiary for the sole purpose of avoiding its RLA and contractual responsibilities, is a major dispute subject to resolution under the RLA . . . . The trackage rights agreement in issue here was a substantial part of a scheme to evade contractual obligations and the attendant duty to negotiate in good faith.

That conclusion is clearly applicable to *Guilford*. *See*, Pet. at 11-12. However, while the lower courts in *Guilford*, relying upon the fact that the ICC had exempted the leases and had imposed employee protective provisions, concluded that the federal courts lacked jurisdiction to enforce the Railway Labor Act obligations, the courts in *Burlington* reached an entirely different result.[1]

In addressing this conflict of laws issue, the Seventh Circuit stated: "The RLA is not rendered nugatory by ICC-approved transactions. To the contrary, the RLA still governs this labor dispute; the district court merely erred in the breadth of relief granted, not the substance." App. A at 25a. As the Court stated (App. A at 30a):

> The ICC approval of the trackage rights agreement does not render the RLA nugatory nor did it divest the district court of jurisdiction to enforce compliance with the RLA. The relief sought by the Unions and authorized pursuant to the RLA may be ordered without upsetting the trackage rights agreement. The relief that should be granted, as in all instances of preliminary injunctions, must be narrowly tailored. A proper injunction will not disturb the ICC-approved transaction, but will nonetheless protect the employees from a unilateral change in the collective bargaining agreement. Thus the trackage rights transaction may be consummated, but Burlington cannot escape its collective bargaining responsibilities through its alter ego, Winona Bridge. Burlington and Winona Bridge, for

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[1] Although the question concerning the applicability of 49 U.S.C. § 11341(a) to rail exemptions was raised (*see*, Supp. Brief filed June 20, 1988, at 14a-15a), the appellate court did not address that issue in its decision, but concluded that, even if it were applicable, § 11341(a) would not prevent enforcement of the labor statute because: "The RLA will not preclude consummation of the transaction and thus does not meet the 'necessary' qualification" of § 11341(a). App. A at 25a.

> purposes of this case, are one and the same, and an injunction may issue enjoining any activity of theirs which would upset the present labor conditions. Insofar as the trackage rights transaction has no impact per se on labor conditions, it may proceed, but any plans to implement labor changes, including crew consists, must be enjoined pending full RLA major dispute resolution procedures.

In reaching that conclusion the appellate court, for essentially two reasons, rejected the Burlington Northern's argument, premised upon *BLE v. Boston & Maine Corp.*, 788 F.2d 794 (1st Cir.), *cert. denied*, 479 U.S. 829 (1986), that enforcement of the Railway Labor Act constituted a collateral attack on the ICC's exemption. First, the court noted that the *Boston & Maine* case did not involve a financial transaction between two related interests. App. A at 28a. And second, the challenge in *Boston & Maine*, according to the Seventh Circuit, "was premised on the transaction's alleged infirmity for failure to comply with the public convenience and necessity policy expressed in 42 U.S.C. § 10901 [*sic*]." App A at 29a. *Burlington Northern*, the appellate court noted, involved complaints in which the unions were pressing "RLA claims which are independently cognizable and addressable irrespective of the merits of the trackage rights agreement transaction before the ICC." *Id.*

Petitioners respectfully submit that the *Burlington Northern*'s resolution of the relationship between the labor and transportation statute is correct, but is in direct conflict with *Guilford*, for *Guilford* involves financial transactions between affiliated corporations where the unions sought the aid of the federal courts to enforce the Railway Labor Act. Unlike the lower courts in *Burlington Northern*, the lower courts in *Guilford*, relying upon *Boston & Maine*, concluded that the ICC's jurisdiction and imposition of employee protections superseded the Railway Labor Act and made that Act unenforceable.

Since the two cases are in conflict over a subject which is important to the entire rail industry, petitioners urge this Court to grant their petition.

CONCLUSION

Petitioners respectfully submit that their petition should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 88-2180

BURLINGTON NORTHERN RAILROAD COMPANY,
Plaintiff-Appellant,

v.

UNITED TRANSPORTATION UNION, *et al.*,
Defendants-Appellees.

No. 88-2181

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Plaintiff-Appellee,

v.

WINONA BRIDGE RAILWAY COMPANY,
Defendant-Appellant.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division
Nos. 88 C 2687 and 88 C 4528—Marvin E. Aspen, *Judge*

ARGUED SEPTEMBER 9, 1988—DECIDED NOVEMBER 18, 1988

Before CUMMINGS and EASTERBROOK, *Circuit Judges,* and GRANT, *Senior District Judge.**

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* The Honorable Robert A. Grant, Senior District Judge for the Northern District of Indiana, sitting by designation.

CUMMINGS, *Circuit Judge*. Appellant Burlington Northern Railroad Company ("Burlington") appeals from the district court's order of June 9, 1988, granting appellees United Transportation Union ("UTU") and Brotherhood of Locomotive Engineers ("BLE") a preliminary injunction enjoining a proposed trackage rights agreement between Burlington and its wholly owned subsidiary, Winona Bridge Railway Company ("Winona Bridge"), pending resolution of a major dispute under the Railway Labor Act, and denying a preliminary injunction enjoining the Unions from striking as well as declaratory judgment relief. We have jurisdiction over this matter pursuant to 28 U.S.C. § 1292(a)(1).

I. FACTS AND PROCEDURAL HISTORY

Burlington Northern is a Class I railroad subject to the jurisdiction of the Interstate Commerce Commission ("ICC") and the provisions of the Interstate Commerce Act ("ICA"), 49 U.S.C. §§ 10101-11917, and the Railway Labor Act, 45 U.S.C. §§ 151-163 ("RLA"). Its railroad system stretches throughout the western, midwestern and southeastern portions of the United States.

At all times relevant to this action, Burlington's crews were represented by the United Transportation Union, apart from the engineers who were represented by the Brotherhood of Locomotive Engineers. The collective bargaining agreements in effect at all times called for crews consisting of one engineer, one conductor and one or two brakemen.

In early 1980, Burlington, in an effort to compete with the lower-priced motor carrier industry, designed its Expediter Service system. The Expediter Service consisted of a locomotive and trailers-on-flatcars which could be operated by a crew of two, an engineer and a brakeman. Burlington believed the lower-priced Expediter Service would compete with motor carriers and attract business

as yet unavailable to Burlington due to the higher costs associated with the existing rail transport systems.

Burlington undertook negotiations with local committees of UTU in an effort to implement the Expediter Service. Most of the local committees of UTU accepted the change in crew consist for the Expediter Service in exchange for special allowances and productivity gainsharing. As a result, the Expediter Service is currently in operation on approximately two-thirds of Burlington's rail system.

Burlington has not been successful, however, in its negotiations with the local committees of UTU comprising its Northern Line, which stretches from St. Paul, Minnesota, to Seattle, Washington. The local committees of the Northern Line have refused to agree to the new crew consists involved in the Expediter Service.

Burlington, undaunted by its setback at the bargaining table, devised another means of accomplishing implementation of its Expediter Service on its Northern Line, one that avoids the necessity of union negotiations. Burlington granted its wholly owned subsidiary, Winona Bridge, trackage rights over the Northern Line. A trackage rights agreement essentially grants rights to a carrier to operate trains over the grantor's track. Such an agreement may limit the use of the track by withholding permission to serve customers along the track, limiting service to specified points on the track or granting unimpaired rights to service points on the track. See *Illinois Commerce Comm'n v. Interstate Commerce Comm'n*, 819 F.2d 311, 312 (D.C. Cir. 1987). The Burlington-Winona Bridge trackage rights agreement ostensibly limited Winona Bridge's right to pick up and set out traffic to Burlington's trailers-on-flatcars hub center in St. Paul, Spokane and Seattle. The trackage rights agreement could be modified, however, to include other such points as Burlington might authorize in writing. As a consequence, the

only impediment to Winona Bridge's unfettered right to use the track as Burlington now does is written permission. The trackage rights agreement covers approximately 1,860 miles of track from Winona Junction, Wisconsin, to Seattle, Washington. The agreement calls for Burlington to supply the trains and all necessary equipment.

At the time of the trackage rights agreement and up to the present, Winona Bridge's assets consisted of an out of service bridge, accompanying operating equipment and 1.07 miles of track. Winona Bridge has five employees, none of whom had ever actually operated trains over the distance contemplated by the trackage rights agreement. Under the proposed plan Winona Bridge, which purportedly is not subject to the collective bargaining agreements with UTE and BLE, would be employing newly hired Expediter Service crews.

As required by statute, Winona Bridge sought ICC authorization to implement the trackage rights agreement. The trackage rights agreement fell within the reach of the ICC's expedited procedure for receiving approval of certain rail transactions. An applicant filing a notice of exemption under 49 U.S.C. §§ 10505 and 11343 is essentially granted an automatic exemption from the typical ICC filing and hearing procedures; the exemption is routinely granted upon a filing received seven days in advance of the proposed transaction. See 49 C.F.R. §§ 1180.2(d)(7) and 1180.4(g)(2).

In response, the Unions filed a petition to reject exemption as well as a petition to revoke exemption. The ICC denied the petition to reject exemption, finding no reason to void on its face the notice of exemption and declining to consider the underlying motivations behind the proposed transaction.[1] Insofar as we have been advised, the ICC has yet to decide the petition for revocation.

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[1] In a January 7, 1988, order, F.D. No. 31163, the ICC denied the Unions' request for rejection of the exemption. The ICC deter-

After unsuccessfully moving for reconsideration by the ICC, UTU appealed to the Court of Appeals for the Eighth Circuit, which dismissed the appeal for want of a final order since the petition for revocation was still pending. *Winter v. Interstate Commerce Comm'n*, 851 F.2d 1056 (8th Cir. 1988).

During this same time period, in December 1987 UTU and BLE each served notice on Burlington as provided by Section 6 of the Railway Labor Act ("RLA"), 45 U.S.C. § 156, insisting that the trackage rights agreement with Winona Bridge constituted a unilateral change in the collective bargaining agreements with Burlington. Burlington argued that Winona Bridge's operations would not affect the working conditions of Burlington employees, and that in any event the ICC authorization relieved Burlington of any RLA-imposed responsibilities. Both disputes were submitted to the National Mediation Board,[2] where they are still pending.

Burlington then filed this action on March 29, 1988, seeking injunctive relief against a threatened strike by the Unions, as well as declaratory relief that (1) RLA provisions antagonistic to the ICA as amended are superseded, and (2) bargaining was not required because the collective bargaining agreements implicitly authorized trackage rights agreements subject to mandatory labor protective conditions prescribed by the ICC. The Unions

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mined at that early stage of the proceedings there was nothing in the notice of exemption to suggest a procedural infirmity and noted that the revocation hearing, which has yet to occur, will provide a forum for the merits of the claims. Two of the five commissioners would have rejected the notice of exemption on the ground that Winona Bridge may not be "another carrier" within the meaning of 49 C.F.R. § 1180.2(d)(7). See *id.* (Vice Chairman Lamboley and Commissioner Simmons, dissenting). The ICC denied the Unions' petition for a stay on March 7, 1988.

[2] Burlington submitted the dispute with UTU to the National Mediation Board on April 7, 1988. BLE submitted its dispute on that same date. Pending our decision, there has been no progress before that Board.

responded with a counterclaim seeking injunctive relief against unilateral changes in working conditions by the carriers as expected following implementation of the trackage rights agreement.[3] The Unions contend that despite the labor protective conditions for present Burlington employees imposed by the ICC, the collective bargaining agreement now in effect with Burlington should also apply to the new Winona Bridge operations. This would preclude Winona Bridge from negotiating an entirely new collective bargaining agreement governing, among other things, crew consists, job opportunities and future benefits, all of which, the Unions argue, could adversely affect Burlington employees. At the extreme, the Unions fear a complete diversion of business from Burlington to Winona after the expiration of the labor protective conditions, which terminate six years following implementation of the trackage rights agreement.

The district court denied the relief requested by Burlington and granted a preliminary injunction in favor of the Unions enjoining Burlington and Winona Bridge from implementing the trackage rights agreement and changing working conditions of employees represented by these Unions until Burlington exhausts the dispute resolution mechanisms set forth in the RLA. On appeals from orders granting or denying preliminary injunctions, we review questions of law *de novo* and set aside factual determinations only if shown to be clearly erroneous. *Roland Machinery v. Dresser Industries*, 748 F.2d 380, 392 (7th Cir. 1984).

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[3] BLE originally filed a separate action against Burlington and Winona Bridge in the Eastern District of Washington, where it also moved for a preliminary injunction enjoining implementation of the trackage rights agreement on May 20, 1988. The district court, McNichols, J., transferred the case to the Northern District of Illinois, where Judge Aspen appropriately ordered the actions consolidated. For the sake of simplicity, we will refer to UTU and BLE collectively as the Unions. Since the actions seek the same relief and are premised on identical grounds, our decision is dispositive of both.

II. THE RAILWAY LABOR ACT: MAJOR OR MINOR DISPUTE

The Railway Labor Act is designed to channel labor disputes into constructive resolution proceedings as a means of avoiding interruptions to commerce among the states. *Detroit & Toledo Shore Line R.R. v. United Transp. Union*, 396 U.S. 142, 148-149 n.13; *Railway Labor Exec. Ass'n v. Pittsburgh & Lake Erie R.R.*, 845 F.2d 420, 423 (3d Cir. 1988); 45 U.S.C. § 152 (disputes are to be settled to "avoid any interruption to commerce or to the operation of any rail carrier").

In order to maintain equal bargaining ability while preserving uninterrupted commercial and rail activity, two distinct avenues for dispute resolution are provided by the RLA. Each prescribed avenue is dependent upon the categorization of the dispute, whether major or minor.[4]

Major disputes are limited to those disputes which arise in the absence or silence of a collective bargaining agreement. Only disputes that cannot be resolved through interpretation or analysis of a collective bargaining agreement are considered major. A major dispute:

> relates to * * * the formation of collective bargaining agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls

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[4] The terms "major" and "minor" disputes are judicially created nomenclature for the statutorily designated categories; neither term appears on the face of the statute. *Railway Labor Exec. Ass'n v. Pittsburgh & Lake Erie R.R.*, 845 F.2d 420, 424 n.1 (3d Cir. 1988). Rather, the statute refers only to "disputes concerning rates of pay, rules, or working conditions," 45 U.S.C. § 151a(2) (major), and "disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions," 45 U.S.C. § 151a(5) (minor). See *Elgin, Joliet & Eastern Ry. v. Burley*, 325 U.S. 711, 723, where the terms were created.

> the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.

Elgin, Joliet & Eastern Ry. v. Burley, 325 U.S. 711, 723.

In contrast, minor disputes include grievances and all those disputes in which a collective bargaining agreement applies as to the disposition of the dispute. While the interpretation or application of the agreement may be questioned in a minor dispute, existence of a collective bargaining agreement is unquestioned. A minor dispute:

> contemplates the existence of a collective bargaining agreement already concluded, or at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The [minor] dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case. . . . In either case the claim is to rights accrued, not merely to have new ones created for the future.

Burley, 325 U.S. at 723. Thus minor disputes cover all those disputes explicitly governed by the collective bargaining agreement, as well as those adopted by the agreement through practice and custom.

Identifying the type of dispute is a necessary prerequisite for determining which statutorily designated avenue of resolution must be followed. Each avenue recognizes the broader implications underlying the respective types of disputes. Consequently, each procedure of dispute resolution is designed to promote the goals of the RLA.

While both dispute resolution procedures contemplate negotiations as the first step towards settlement, thereafter the paths diverge. Because major disputes concern the creation of contractual rights, not enforcement of es-

tablished rights, and pose the greatest threat to the goals of the RLA, *viz.*, interruptions to commerce and labor strife, such disputes are designed to be settled by the parties themselves through negotiation and mediation under the auspices of the National Mediation Board. If that fails, then the procedure allows for acceptance or rejection of binding arbitration as well as cooling-off periods. During this time, the status quo prevails. 45 U.S.C. §§ 155, 156, 160. Therefore the carrier cannot unilaterally implement its plans, but must "preserve and maintain unchanged those actual, objective working conditions and practices, broadly conceived, which were in effect prior to the time the pending dispute arose and which are involved or related to that dispute." *Detroit & Toledo Shore Line Ry. Co. v. United Transp. Union*, 396 U.S. 142, 152-153. The parties are not under compulsion to agree specifically, but, rather to exhaust all possibilities of conciliatory, negotiated agreement before resorting to self-help. After the RLA procedures are exhausted, if a strike ensues over a major dispute, the Norris-LaGuardia Act (29 U.S.C. §§ 106-115) precludes injunctive relief.

In contrast, minor disputes arise more often and call into question grievances and the interpretation or enforcement of vested contractual rights. Ostensibly the parties have previously assented to the various rights and obligations attendant to a collective bargaining agreement and all that remains is determination of those rights and obligations. Consequently, the procedure for resolving a minor dispute is binding arbitration before the National Railroad Adjustment Board or a special adjustment board. *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R.R.*, 353 U.S. 30. In contrast to a major dispute, where the contractual rights and obligations in issue have not yet been negotiated and arbitration could be futile, a minor dispute involves issues which the collective bargaining agreement addresses; the parties have already negotiated and agreed upon how

to govern such a dispute and usually all that is required to settle the dispute is contract interpretation. And, unlike a major dispute, the carrier may "continue to apply its interpretation of the agreement" and accordingly implement its view of the issue pending decision by the Adjustment Board. Moreover, the union is prohibited from striking pending and following the decision of the Adjustment Board. *Chicago River & Indiana R.R., supra.*

The initial issue thus posed to this Court: Is the dispute between the carriers—Burlington and Winona Bridge—and the Unions—UTU and BLE—a major or a minor dispute? If the dispute is minor, the district court should have enjoined the threatened strike as prayed by the carriers; if the dispute is major, as the district court held, it should have issued a status quo injunction enjoining railroad alteration of the prior working conditions and practices pending mediation.

Burlington reminds the Court of our past admonition, " 'if there is any doubt as to whether a dispute is major or minor a court will construe the dispute to be minor.' " (Br. 36) (quoting *Railway Labor Exec. Ass'n v. Norfolk & Western Ry.*, 833 F.2d at 700, 705 (7th Cir. 1987)). While that is the true standard, we agree with the district court's assessment that "the dispute here between UTU and Burlington regarding working conditions on trains operated pursuant to the trackage rights agreement is a major dispute subject to the mandatory bargaining and status quo provisions of the RLA." 688 F. Supp. 1261, 1266 (N.D. Ill. 1988). Our responsibility is not to weigh the merits of Burlington's argument, because we only have jurisdiction to determine whether the dispute is arguably resolved by reference to the collective bargaining agreement. We keep in mind that if the parties disagree as to whether reference to their collective bargaining agreement can resolve the dispute:

> the dispute is minor unless the carrier's claims of contractual justification are 'frivolous' or 'obviously insubstantial.' The court does not consider the merits of the underlying dispute; its role is limited to determining whether the dispute can be characterized as involving the proper application or meaning of a contract provision.

Norfolk & Western Ry., 833 F.2d at 704, quoting *Atchison, Topeka & Santa Fe Ry. v. United Transp. Union*, 734 F.2d at 317, 321 (7th Cir. 1984) (additional citations omitted). If so, Congress has committed the resolution of the dispute to the National Railroad Adjustment Board.

The collective bargaining agreement need not explicitly address the dispute in issue because a collective bargaining agreement embodies terms not necessarily express but nonetheless included by implication. It is well established that a dispute over the practice of a carrier is governed by the collective bargaining agreement, and thus minor, if it is shown that the carrier acted similarly in the past with the union's knowledge and acquiescence. *Detroit & Toledo Shore Line R.R.*, 396 U.S. at 153-154; *National Ry. Labor Conf. v. International Ass'n of Machinists & Aerospace Workers*, 830 F.2d 741, 747 (7th Cir. 1987); *Main* [*sic*] *Central R.R. v. United Transp. Union*, 787 F.2d 780 (1st Cir. 1986), certiorari denied, 107 S. Ct. 189. The past practice in effect becomes a part of the implied-in-fact contract between the carrier and union, and such disputes amount to an interpretation of the contract.

The relevant collective bargaining agreements here are silent as to trackage rights agreements and any attendant changes. Burlington, however, argues that the Unions have acquiesced in numerous (forty in the past decade) such transactions and always found ICC-imposed employee protective conditions satisfactory in the

past. Prior to this consolidated suit, the Unions have not protested or disputed a single Burlington trackage rights agreement. None of such previous agreements had been subjected to mandatory bargaining. Therefore, Burlington contends, the right to engage freely in trackage rights agreements is permitted under the implied-in-fact terms of the collective bargaining agreement, so that a minor dispute is involved.

But Burlington has shaded the issue. This dispute does not simply concern, as Burlington suggests, the type of trackage rights agreement in which the Unions have repeatedly acquiesced. Rather, this is an attempt by a carrier to evade unilaterally the statutory and contractual rights vested in the Unions through the use of a trackage rights agreement destined to convey rights over its Northern Line, approximately 1,800 miles of track, to a wholly owned, five-employee subsidiary which utterly lacks any of the necessary equipment to service such a line. As far as the record shows, Burlington has failed to show that the Unions have established a pattern of mutual assent, understanding or acquiescence as to a trackage rights agreement with a wholly owned Burlington subsidiary granting wholesale rights over 1,800 miles of track with the potential for a huge diversion of business and the resulting possibility of a unilateral denial of statutory and contractual rights. See, *e.g.*, *Brotherhood of Maint. of Way Employees v. Chicago & North Western Transp. Co.*, 827 F.2d 330 (8th Cir. 1987). Our major dispute holding is not tainted by judging the merits of the claim itself, as Burlington has suggested with respect to the trial court's decision. Rather, our determination narrowly focuses on whether Burlington has put forth a credible argument that the dispute in issue may be resolved by application of the collective bargaining agreement, and Burlington's claim that the issue here is resolvable by reference to the collective bargaining agreement unduly strains the imagination. Burling-

ton's argument that it has an implied contractual right to alter unilaterally crew consists is simply too insubstantial to sustain.

The case at bar is easily distinguished from *Air Line Pilots Ass'n v. Eastern Air Lines*, No. 88-7202, slip op. (D.C. Cir. Sept. 30, 1988), cited by Burlington. There the Court of Appeals for the District of Columbia Circuit vacated a preliminary injunction entered by the district court enjoining Eastern from furloughing employees in furtherance of a planned work reduction. The Union asserted that the planned furloughs represented a unilateral change in working conditions subject to the major dispute resolution procedures of the RLA. This argument was rejected because the collective bargaining agreement explicitly addressed the issue of furloughs, and furloughs had been effected in the past. Slip op. at 12-14, 16-17. The court also rejected the Union's contention that the large number of employees scheduled to be furloughed distinguished the dispute from the terms of the collective bargaining agreement and past practices, holding instead that the extent of planned work reduction and furloughs was in fact consistent with the collective bargaining agreement and past practices. Slip op. at 14, 16-17. Finally, the court uncovered no evidence of an intent by Eastern to shift business to a less unionized affiliate carrier. Slip op. at 24-36.

The facts here completely distinguish this case from *Air Line Pilots Ass'n.* As already discussed, this dispute is not simply over Burlington's decision to grant trackage rights to another carrier. Rather, the dispute is more properly framed as an attempt by Burlington to alter unilaterally crew consists over its Northern Line. The trackage rights agreement is merely the vehicle designed to effect the change. Insofar as the Court in *Air Line Pilots Ass'n* attached significance to the failure of the Union to show anti-union animus or intent to shift business to a less unionized affiliate, here the Unions have

shown both indicia of anti-union animus and that business will be diverted to Burlington's wholly owned subsidiary due to its anticipated lower labor costs.

Burlington also relies on our decision in *Chicago and North Western Transp. Co. v. Railway Labor Exec. Ass'n*, 855 F.2d 1277 (7th Cir. 1988), decision stayed, 57 U.S.L.W. 3185 (Stevens, J.). In that case, this Court held that the carrier's argument that a sale of a portion of the business and the resulting loss of jobs was comprehended by the explicit language as well as the past practice of the collective bargaining agreement was "at least plausible." 855 F.2d at 1285. Since oral arguments here, that decision has been stayed pending the Supreme Court's action upon the petition for certiorari, and the injunction against a threatened strike lifted, by Justice Stevens, thus casting some uncertainty as to the case's authority. Here, while Burlington may have a plausible argument that the collective bargaining agreement envisions trackage rights agreements, no such argument exists for Burlington's unilateral right to alter crew consists. Burlington's claim of contractual justification is "so obviously insubstantial as to indicate that it is attempting to circumvent § 6 RLA major dispute resolution procedure." 855 F.2d at 1285 (citations omitted).

Burlington's own conduct undermines its position. As it was—and still is—required to do, Burlington first negotiated with the Unions for the change in crew consists of the Expediter Service. Only after preliminary negotiation proved unsuccessful did Burlington attempt the trackage rights agreement. Burlington left little doubt that it was intentionally avoiding its obligations to the Unions when it sent a letter to all its employees explaining the agreement with Winona Bridge and reading in relevant part:

> Although [Burlington] has held a number of meetings with representatives of the general committees

> on the Northern routes, *we have not been able to reach agreement.* As a result, [Winona Bridge] has asked the United Transportation Union and Brotherhood of Locomotive Engineers (BLE) internationals to begin negotiations on March 17 in St. Paul regarding representation of employees on a [Burlington] subsidiary, the Winona Bridge Railway Company . . .
>
> * * * *
>
> WBBR [Winona Bridge] is BN's [Burlington's] *second choice.* BN would have preferred to have successfully negotiated with the UTU Northern Line committees to make BN more competitive. Because representatives of the committees have been unwilling to negotiate the necessary agreement, WBBR will begin operations as soon as it can obtain union representation and finalize customer contracts. * * *

Appellants' App. at Tab. 4, p. 1. See 688 F. Supp. 1261 1264 (N.D. Ill. 1988) (emphasis in original).[5] Thus Burlington plainly acknowledged that Winona Bridge was Burlington's second choice, an alternative to unsuccessful union negotiations. Disappointed with the Unions' response, Burlington simply attempted to sidestep any continuing obligations by securing the trackage rights agreement.

On December 4, 1987, UTU served notice, as required by Section 6 of the RLA (45 U.S.C. § 156), of a proposed change in agreements in order to provide that all trains of Winona Bridge on Burlington lines be manned by Bur-

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[5] The letter also informed the employees that in June 1987, when Burlington was negotiating with UTU, Burlington informed the Union that without the changes, Burlington would be forced to take steps that would not be in the best interests of the railroad or the employees. Moreover, the letter continued to urge employees to negotiate revised crew consist agreements, arguing that failure to do so will "result in *lost income to present [Burlington] employees.*" Appellants' App. at Tab 2, p. 3.

lington employees pursuant to Burlington's collective bargaining agreement with the UTU. Thereafter Burlington initiated voluntary discussions with the UTU. When these preliminary discussions proved unsuccessful, Burlington submitted the dispute to the National Mediation Board, the initial step in the major dispute resolution mechanism, and adhered to the original proposal that Winona Bridge should be able to hire a new group of employees. Consequently, Burlington's own actions support the conclusion that the entire dispute is major.

The fact that Winona Bridge would operate the trains, not Burlington, its parent corporation, is of no consequence. The district court was correct in holding that a carrier cannot evade its duties under a collective bargaining agreement or the RLA by directing business to an entity within the same corporate family and not obligated by the existing collective bargaining agreement. 688 F. Supp. 1261, 1266-1267 (N.D. Ill. 1988), citing *International Ass'n of Machinists and Aerospace Workers v. Eastern Airlines*, No. 87-1720, 127 L.R.R.M. 3078 (D.D.C. 1988), vacated and remanded on other grounds, No. 88-7079 (D.C. Cir. 1988); *Butte, Anaconda & Pacific Ry. v. Brotherhood of Locomotive Firemen and Engineers*, 268 F.2d 54 (9th Cir. 1959), certiorari denied, 361 U.S. 862.

This case is remarkably similar to *Butte*. There too a transfer between a parent and its wholly owned subsidiary was undertaken for the purpose of defeating union negotiation. The Ninth Circuit rejected the argument that the transfer eliminated the dispute and explained:

> Here, however, the carrier is the wholly-owned subsidiary of the shipper * * * [T]he two have common principal officers and the unified purpose of serving the ultimate best interests of the shipper. Under these circumstances the act of [the subsidiary] in taking over the switching service, to be performed by employees represented by another union, must be regarded as the act of the [parent corporation].

268 F.2d at 59. Consequently, the court of appeals held that a major dispute was still involved and that therefore the mediation provision of the RLA was controlling so that an injunction against a strike threat was unwarranted. The same rationale applies to the assumption of the Expediter Service by Winona Bridge. Winona Bridge is not an independent carrier [6] but is merely an extension of Burlington. As such, Burlington cannot evade its responsibilities by transferring rights to an extension of itself. *Butte.*

Burlington argues that Winona Bridge will only service "new" business while all existing business will remain with Burlington. Since, according to Burlington, the new work being transferred to Winona Bridge is not

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[6] The letter sent from Burlington to its employees highlights this obvious proposition. See note 5, *supra.* Not only did Burlington admit this action was taken only as a second-best measure to a negotiated agreement with the Unions, but Burlington still continued to urge for a revised crew consist agreement. In fact, in its letter to employees, Burlington wrote that on June 7, 1987, it informed UTU that a failure in negotiations would mean that "[Burlington]" would have "to hire new employees." If Burlington and Winona Bridge were truly distinct entities, further negotiation would have been moot following the trackage rights agreement. In his dissent, ICC Vice Chairman Lamboley also questioned whether Winona Bridge was "another carrier."

> The agreement here is an intracorporate grant of lengthy trackage rights by a parent to its wholly-owned, nonoperating, one-mile long subsidiary which has no equipment or rail-service employees; [Burlington] will necessarily supply all * * *. This is obviously not a typically bargained, two-sided trackage rights agreement between carriers.
>
> * * * *
>
> Accordingly, one cannot help but glean from the record the obvious possibilities: [Burlington] intends to use the trackage rights and [Winona Bridge's] corporate shell to transfer increasing levels of its present operations on the line to [Winona Bridge].

F.D. No. 31163 at 7 (Vice Chairman Lamboley dissenting).

included in the present collective bargaining agreement, it supposedly is not a matter subject to mandatory bargaining. We are not persuaded.

As the district court noted, the Burlington trackage rights agreement with Winona Bridge contemplates future additional transfers of business to Winona Bridge.[7] 688 F. Supp. 1261, 1267 (N.D. Ill. 1988). The prospect of having work shifted to a replacement subsidiary is itself a change in working conditions and practices subject to the status quo and mandatory bargaining practices of the RLA, including the services of the National Mediation Board. *Air Line Pilots Ass'n v. Transamerica Airlines*, 817 F.2d 510 (9th Cir. 1987).

The deprivation of a work opportunity to these employees is also a change in working conditions. "The deprivation of a work opportunity involving the type of work traditionally performed by the Union is a change in working conditions, even where the work is new." *Transport Workers Union v. Eastern Air Lines*, 544 F. Supp. 1315, 1327 (E.D.N.Y.), affirmed and modified, 695 F.2d 668 (2d Cir. 1982). Burlington itself recognized the intimate connection between work opportunity and present working conditions in its letter to its employees. See note 5 *supra*.

The distinction claimed between new and existing business deserves close analysis. If a carrier truly developed new business, quite apart from that already performed by employees pursuant to a collective bargaining agreement, and that new work was transferred to another corporation, it might fall outside the bounds of the collec-

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[7] Although the trackage rights agreement ostensibly limits Winona Bridge to service points in St. Paul, Spokane and Seattle, the agreement can of course be modified to include other such points as Burlington may authorize in writing. Further, the agreement does not preclude swap arrangements whereby Burlington would sell existing business to a third carrier for new business that would be directed to Winona Bridge.

tive bargaining agreement. But when, as here, a carrier claims that the business it will be able to attract with lower prices obtained by evading Union costs is new, the business might be new but the work is not. It is work controlled by the labor agreements. Moreover, Burlington fails to distinguish new business from normal turnover. The rail carrier industry, like most businesses, is not static. In any given year, old accounts may fade while new accounts are welcomed. Under Burlington's definition of new business, all turnover may be channelled to Winona Bridge, the extreme result being an eventual wholesale shift of business to Winona Bridge, while the cumulative amount of business of Burlington and Winona Bridge remains constant. Burlington's argument would apparently consider as new business every customer who calls hereafter for service on this Northern Line.

In the instant case, the claimed distinction between "old" and "new" business is illusory. This case is distinguishable from *Air Lines Pilots Ass'n v. Texas Internat'l Airlines*, 656 F.2d 16 (2d Cir. 1981). There the Second Circuit determined that the creation of a new subsidiary to service an air route not being serviced by an established subsidiary was not a diversion of existing business, but was new business not within the purview of the collective bargaining agreement. But the situation here is instead comparable to *Air Line Pilots Ass'n v. Transamerica Airlines*, 817 F.2d 510 (9th Cir. 1987), in which the Ninth Circuit found a diversion of present business. A crucial difference noted by the Ninth Circuit was that the subsidiary to which business was diverted would operate in the same market place. 817 F.2d at 525.

Here, as in *Transamerica*, Burlington is not transferring new business to Winona Bridge. Winona Bridge will be operating trains (very likely Burlington-owned trains) over Burlington tracks and covering the exact same geographic market as currently serviced by Burlington. The only appreciable difference will be the cost of the Expe-

diter Service, which is less than the traditional Burlington service. This lowered cost, however, is attributable in whole or significant part to lower labor costs accomplished by side-stepping the collective bargaining agreement.

To hold otherwise would undermine the RLA. A carrier would be free to evade virtually every collective bargaining agreement on the flimsy assertion that the "new" business is business that the carrier could not have obtained while operating under the collective bargaining agreement. Under Burlington's plan all business which can be solicited by undermining labor contracts would be new business, since the business could not be obtained due to the labor costs under the collective bargaining contract. Such an argument is tortured and must be rejected. The district court properly held that regardless of the masquerade, this dispute is a "major" one requiring compliance with the RLA terms governing such disputes and not permitting injunctive relief.

III. THE INTERSTATE COMMERCE ACT

Burlington and Winona Bridge urge this Court to hold that the RLA is superseded *pro tanto* by the ICA. Essentially, both argue that regardless of our disposition of the major-minor dispute issue, the bargaining procedures mandated by the RLA are inapplicable because the ICC, which has exclusive jurisdiction to approve and regulate trackage rights agreements, approved the transaction between the two carriers and imposed statutorily required labor protective conditions under a post-RLA provision of the ICA. Consequently, according to appellees the transaction is cloaked with a statutory grant of immunity from any laws that interfere with the transaction. We did not need to resolve a similar superseding question in *Chicago and North Western Transp. Co. v. Railway Labor Exec. Ass'n*, 855 F.2d 1277 (7th Cir. 1988),

decision stayed, 57 U.S.L.W. 3185 (Stevens, J.), nor do we resolve it here.

The purported conflict between the pertinent later provisions of the Interstate Commerce Act and the Railway Labor Act is admittedly not easily resolved. Only a few Circuits have taken the opportunity to address it, and the results have been less than consistent.[8] Our burden is eased by the facts of this case which permit a result compatible with both statutes.

The railroad industry has for some time been in serious decline. Congress has recognized this situation and taken steps to revitalize the industry, primarily by removing many of the regulatory impediments interfering with rail transactions and allowing competitive pricing. The first major amendment to the ICA since 1940 was the Railroad Revitalization and Regulatory Reform Act of 1976 ("4-R Act"), Pub.L.No. 94-210, 90 Stat. 31. The 4-R Act was designed to remove unnecessary barriers which prohibited railroads from competing with other modes of transportation, while at the same time maintaining necessary protection for rail customers. S.Rep. No. 499, 94th Cong. 2d Sess. 1. Particular attention was accorded to streamlining the ICC regulatory processes, with an emphasis on mergers, consolidations and certain other forms of rail transactions. *Id.* at 15-21.

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[8] There is a division among the Circuits that have already addressed this issue. Compare, *e.g., Railway Labor Exec. Ass'n v. Pittsburgh & Lake Erie R.R.*, 845 F.2d 420 (3rd Cir. 1988) (enjoining ICC-approved transaction due to a major dispute), and *Railway Labor Exec. Ass'n v. City of Galveston*, 849 F.2d 145 (5th Cir. 1988) (enjoining ICC-approved transaction due to major dispute), with *Brotherhood of Locomotive Engineers v. Boston & Maine Corp.*, 788 F.2d 794 (1st Cir. 1986), certiorari denied, 107 S.Ct. 111 (held that ICA supersedes portions of RLA); *Railway Labor Exec. Ass'n v. Chicago and North Western Transp. Co.*, 848 F.2d 102 (8th Cir. 1988) (held that ICA supersedes portions of RLA).

The 4-R Act proved to be too little to halt the decline. By 1980, the railroad industry remained beset with financial difficulties which threatened vast segments of the industry. Congress responded in 1980 by creating the Staggers Rail Act, Pub.L.No. 96-448, 94 Stat. 1895.[9] The Staggers Act recognized that many of the regulations imposed upon the railroad industry were outdated. Originally, the ICA was essential "to prevent an abuse of monopoly power by railroads and to maintain a national railroad network as an essential part of the national transportation system." Staggers Conf. Rep. No. 1430, 96 Cong. 2d Sess. 79. By 1980, however, two thirds of intercity transportation was conducted by means other than rail; rail earnings were the lowest of any carrier industry; capital shortfalls between $16 billion and $20 billion were expected. *Id.* The overall purpose of the Staggers Act was to "provide, through financial assistance and freedom from unnecessary regulation, the opportunity for railroads to obtain adequate earnings to restore, maintain and improve their physical facilities while achieving the financial stability of the national rail system." *Id.* at 80.

Significant portions of the Staggers Act streamlined the regulatory process by either relieving the ICC from conducting investigations and hearings altogether, or shortening the time frame for mergers, consolidations and certain other rail transactions. The Staggers Act required the ICC to reduce its regulatory procedure for those transactions which are routinely and consistently approved. *Id.* at 120. One of the most significant features, and certainly a clear example of Congress' intent for immediate deregulation, was the exemption procedure, in which the ICC was instructed to grant exemptions from regulation and then conduct post-hoc reviews. The

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[9] See generally, Note, *Fine-Tuning Deregulation: The Interstate Commerce Commission's Use of Its General Rail-Exemption Power*, 53 Geo.Wash.L.Rev. 827 (1985).

"class exemptions" are to be granted "whenever regulation is not needed to protect abuses of market power." *Id.* at 105. Congress entrusted the ICC with identifying the "specific regulatory provisions and practices * * * to determine where they can be deregulated consistent with the policies of Congress; the stated policy explicitly lists deregulation over the national rail system in general and reducing regulatory barriers to entry and exit from the industry as factors." *Id.*[10] The aim was to reduce ICC

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[10] The national railroad transportation policy is codified at 49 U.S.C. § 10101a. The fifteen factors constituting federal rail policy, of which labor is but one (the twelfth), are:

> (1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;
>
> (2) to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required;
>
> (3) to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Interstate Commerce Commission;
>
> (4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and national defense;
>
> (5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes;
>
> (6) to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital;
>
> (7) to reduce regulatory barriers to entry into and exit from the industry;
>
> (8) to operate transportation facilities and equipment without detriment to the public health and safety;
>
> (9) to cooperate with the States on transportation matters to assure that intrastate regulatory jurisdiction is exercised in accordance with the standards established in this subtitle;

regulatory exercise to those instances where "necessary to protect against abuse of market power where other federal remedies are inadequate." *Id.* It was decided that this determination should be made, if at all, in a post-hoc hearing.

Congress clearly envisioned swift and efficient approval of rail consolidations, mergers and grants such as the type at issue. This Court is reluctant to take any action which would disturb the process encouraged by Congress through its 1980 amendments of the ICA. At the same time, it should be noted that Congress has not made any substantial revisions in the RLA since 1934. Ours is not the first Circuit impressed by this inaction. *See Railway Labor Exec. Ass'n v. Pittsburgh & Lake Erie R.R.*, 845 F.2d 420 (3rd Cir. 1988). Fortunately, this case does not require a determination which would offend the policies and goals of either Act. Rather, the primary relief requested concerns a labor dispute, not the trackage rights agreement itself.

Section 10505 of the ICA authorizes the ICC to exempt rail transportation but not "to relieve a carrier of its obligation to protect the interests of employees." Section

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(10) to encourage honest and efficient management of railroads and, in particular, the elimination of noncompensatory rates for rail transportation;

(11) to require rail carriers, to the maximum extent practicable, to rely on individual rate increases, and to limit the use of increases of general applicability;

(12) to encourage fair wages and safe and suitable working conditions in the railroad industry;

(13) to prohibit predatory pricing and practices; to avoid undue concentrations of market power and to prohibit unlawful discrimination;

(14) to ensure the availability of accurate cost information in regulatory proceedings, while minimizing the burden on rail carriers of developing and maintaining the capability of providing such information; and

(15) to encourage and promote energy conservation.

11343(a) requires Commission approval of trackage rights agreements such as involved here, and Section 11344 covers the procedure therefor. In turn, Section 11347 requires labor protective conditions in Section 11344 cases. The carriers thus postulate that since Section 11341(a) provides that a carrier in an exempt transaction such as the Burlington-Winona Bridge trackage rights agreement "is exempt from the antitrust laws and *from all other laws* * * *", the carrier is only bound by the labor protective provisions which the Commission's exemption condition made applicable here to "any employees affected by the trackage rights" (Carriers' App. Tab 2). The trouble is that the carriers have ignored the statutory language following "from all other laws." The entire phrase reads "is exempt from the antitrust laws and all other laws, including State and municipal laws, *as necessary* to let that person carry out the transaction, hold, maintain, and operate property, and exercise control over franchises acquired through the transaction" (emphasis supplied). The RLA will not preclude consummation of the transaction and thus does not meet the "necessary" qualification, so that the trackage rights agreement is not freed entirely from the RLA by the language in Section 11341(a) as the carriers contend.

The RLA is not rendered nugatory by ICC-approved transactions. To the contrary, the RLA still governs this labor dispute; the district court merely erred in the breadth of relief granted, not the substance. As we stated previously, the trackage rights agreement per se does not make this a major dispute; rather the use of a trackage rights agreement, via a shell subsidiary, to abrogate a collective bargaining agreement constitutes a major dispute.

Regardless of whether the ICA superseded the RLA, the injunction enjoining the trackage rights agreement was erroneous because the injunction was needlessly overbroad. An injunction should be narrowly tailored to serve

equity's interest.[11] In this instance, given the singularity of interests of Burlington and Winona Bridge, a proper injunction should only have enjoined unilateral changes in working conditions by either Burlington or Winona Bridge pending RLA procedures, regardless of the status of the trackage transaction. Because we hold that Winona Bridge, as the alter ego of the Burlington, is bound by the existing collective bargaining agreements, it is unnecessary to decide whether the RLA is superseded in part by the ICA. The preliminary injunction granted by the district court should not have interfered with the trackage rights agreement. In that way, the RLA and ICA provisions would not have conflicted.

The ICA, by virtue of the Staggers Act exemption, arguably divests the courts of jurisdiction to enjoin the proposed trackage rights agreement itself. Nevertheless since Winona Bridge is the alter ego of its parent Burlington, like the situation in *Butte*, the RLA compels a status quo injunction as to the planned unilateral changes in working conditions pending RLA procedures. Even though the Staggers Act may prevent enjoining the trackage rights agreement, an injunction should be granted under the RLA to maintain the status quo with respect to working conditions.

This determination is not inconsistent with 49 U.S.C. § 11347, which provides for mandatory labor protective conditions in exemption cases of this nature.[12] See *Nor-*

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[11] This Court of course gives substantial deference to a district court's decision to grant a preliminary injunction. *Lawson Products v. Avnet, Inc.*, 782 F.2d 1429, 1437 (7th Cir. 1986). An important consideration is whether the proposed injunction will disserve the public interest. Given Congress' intent to promote efficient rail transactions, the unnecessarily broad scope of the district court's injunction, and the option of a narrower injunction, the scope of the granted injunction is too broad to further the vital public interest embodied in the ICA.

[12] 49 U.S.C. § 11347 provides:

> When a rail carrier is involved in a transaction for which approval is sought under sections 11344 and 11345 or section

folk and Western R. Co.—Trackage Rights—Burlington Northern, Inc., 354 I.C.C. 605 (1978), modified, *Mendocino Coast Ry.—Lease and Operate—California Western R.R.*, 360 I.C.C. 653 (1980), affirmed *sub nom. Railway Labor Exec. Ass'n v. United States*, 675 F.2d 1248 (D.C. Cir. 1982). Moreover, Section 11347, in conjunction with the *Mendocino* labor protective conditions, also stipulates "retention of '[t]he rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits * * * unless changed by future collective bargaining agreements or applicable statutes.'" *Interstate Commerce Comm'n v. Brotherhood of Locomotive Engineers*, 107 S. Ct. 2360, 2363-2364, citing *Norfolk and Western*, 354 I.C.C. at 610.

Section 11347, as interpreted by the ICC with Supreme Court approval, requires that the existing collective bargaining agreement be preserved, and since we have determined that in the setting of this case Winona Bridge does not represent an employer distinct from Burlington, an injunction requiring Winona Bridge to bargain with the Unions is consistent with the ICC-prescribed labor protective conditions. Our decision merely binds Winona Bridge to respect contractual obligations preserved not only under the RLA, but under the ICA as well.

11346 of this title, the Interstate Commerce Commission shall require the carrier to provide a fair arrangement at least as protective of the interest of employees who are affected by the transaction as the terms imposed under this section before February 5, 1976, and the terms established under section 405 of the Rail Passenger Service Act (45 U.S.C. 565). Notwithstanding this subtitle, the arrangement may be made by the rail carrier and the authorized representative of its employees. The arrangement and the order approving the transaction must require that the employees of the affected rail carrier will not be in a worse position related to their employment as a result of the transaction during the 4 years following the effective date of the final action of the Commission (or if an employee was employed for a lesser period of time by the carrier before the action became effective, for that lesser period).

As noted previously, Burlington and Winona Bridge are for purposes of this case one and the same under the rationale of *Butte*. Therefore an injunction may issue prohibiting Winona Bridge from implementing any unilateral changes in working conditions, including changes in crew consists, pending the major labor dispute resolution as prescribed by the RLA. Our exercise of jurisdiction and consequent approval of injunctive relief consistent with the RLA in no way challenges Burlington's and Winona Bridge's trackage rights agreement under the ICA. The agreement may proceed apace, but unilateral changes in working conditions may not be implemented regardless of the status of the proposed trackage rights transaction.

IV. COLLATERAL ATTACK

Burlington and Winona Bridge urge this Court to hold that the Unions' claim under the RLA constitutes an impermissible attack on an ICC order, whereas ICC orders are only reviewable pursuant to 28 U.S.C. §§ 2321 and 2342, and exclusively by the Courts of Appeals. Burlington cites *Brotherhood of Locomotive Engineers v. Boston & Maine Corp.*, 788 F.2d 794 (1st Cir. 1986), in support of its argument. In *Boston & Maine*, the First Circuit determined that a union prayer for injunctive relief enjoining an ICC-approved trackage lease agreement based upon the RLA major dispute provisions constituted an impermissible collateral attack on the ICC approval. Although the cases are facially similar, at least one crucial difference exists: The parties to the agreement in *Boston & Maine* were in fact distinct entities whereas Burlington and Winona Bridge represent a singular interest. Consequently, the trackage rights agreement is not disturbed by requiring bargaining after the ICC authorization. Moreover, the actions now pursued by the Unions differ fundamentally from their challenge before the ICC. Although both attacks may have been initiated for identical reasons, the ICC challenge

was premised on the transaction's alleged infirmity for failure to comply with the public convenience and necessity policy expressed in 42 U.S.C. § 10901 [*sic*]. Here the Unions have pressed RLA claims which are independently cognizable and addressable irrespective of the merits of the trackage rights agreement transaction before the ICC.

V. THE NORRIS-LA GUARDIA ACT

Finally, Burlington and Winona Bridge urge this Court to enjoin a threatened strike by the Unions. The Unions have threatened to strike since Burlington has refused to follow the procedures for resolution of a major dispute as set out in the RLA.

We have already determined that the dispute in issue is major. Therefore, pursuant to the RLA, the status quo must prevail until the major dispute resolution procedures have been exhausted or the two sides agree. In the meantime each side, carriers and Unions, is forbidden from engaging in self-help or unilateral implementation of its plan.

If a carrier would alter the prevailing status quo, such a unilateral change in working conditions would effectively upset the Unions' bargaining leverage and ability to reach a fair settlement. See *Detroit & Toledo Short* [*sic*] *Line R.R. v. United Transp. Union*, 396 U.S. 142, 150; *Local 879, Allied Indus. Workers v. Chrysler Marine*, 819 F.2d 786, 788 (7th Cir. 1987). In such an instance, where the "carrier refuses to follow the procedures of the Act, * * * the Union may strike." *United Indust. Workers v. Board of Trustees of Galveston Wharves*, 400 F.2d 320, 334 (5th Cir. 1968) certiorari denied, 395 U.S. 905.

Burlington and Winona Bridge have thus far failed to comply with the RLA mandatory bargaining procedures. Accordingly, under Section 8 of the Norris-LaGuardia

Act, 29 U.S.C. § 108,[13] they are precluded from seeking relief from the Unions' threatened strike. As the Supreme Court explained:

> If a complainant has failed (1) to comply with any obligation imposed by law or (2) to make every reasonable effort to settle the dispute, he is forbidden relief.

Brotherhood of R.R. Trainmen v. Toledo, Peoria & Western R.R., 321 U.S. 50, 56-57. Because Burlington has so far failed to proceed with the RLA major dispute resolution procedures,[14] Burlington—and Winona Bridge—are precluded from seeking relief against the threatened strike.

CONCLUSION

To summarize, we conclude that a dispute resulting from a rail trackage rights agreement where a carrier leases trackage rights to a wholly owned, completely dependent subsidiary for the sole purpose of avoiding its RLA and contractual responsibilities, is a major dispute subject to resolution under the RLA rather than by injunction against the Unions in violation of the Norris-LaGuardia Act. The trackage rights agreement in issue here was a substantial part of a scheme to evade contractual obligations and the attendant duty to negotiate in good faith. The planned changes in the crew consist have no basis in the collective bargaining agreement so that there is no minor dispute entitling the carriers to

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[13] Section 8 provides:

> No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery or mediation or voluntary arbitration.

[14] But see note 2 *supra*.

an injunction. Although the Unions in the past may have acquiesced in trackage rights agreements, they have never acquiesced in a trackage rights agreement whose purpose is to defeat a collective bargaining agreement.

The ICC approval of the trackage rights agreement does not render the RLA nugatory nor did it divest the district court of jurisdiction to enforce compliance with the RLA. The relief sought by the Unions and authorized pursuant to the RLA may be ordered without upsetting the trackage rights agreement. The relief that should be granted, as in all instances of preliminary injunctions, must be narrowly tailored. A proper injunction will not disturb the ICC-approved transaction, but will nonetheless protect the employees from a unilateral change in the collective bargaining agreement. Thus the trackage rights transaction may be consummated, but Burlington cannot escape its collective bargaining responsibilities through its alter ego, Winona Bridge. Burlington and Winona Bridge, for purposes of this case, are one and the same, and an injunction may issue enjoining any activity of theirs which would upset the present labor conditions. Insofar as the trackage rights transaction has no impact per se on labor conditions, it may proceed, but any plans to implement labor changes, including crew consists, must be enjoined pending full RLA major dispute resolution procedures.

We vacate the order of the district court and remand for formulation of a preliminary injunction consistent with this decision.

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CLERK

(8)

No. 87-1911

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Petitioners,

v.

GUILFORD TRANSPORTATION INDUSTRIES, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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RESPONDENTS' SUPPLEMENTAL BRIEF

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December 1, 1988

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

5 pp

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RESPONDENTS' SUPPLEMENTAL BRIEF

This Supplemental Brief is being filed in response to the Fourth Supplemental Brief for Petitioners, which brought to the Court's attention the recent Seventh Circuit decision in *Burlington Northern R.R.* v. *United Transp. Union*, Nos. 88-2180 & 88-2181 (Nov. 18, 1988). The petitioner unions assert that *Burlington Northern*, which held that the parties to an ICC-approved transaction in that case are corporate "alter egos" for labor purposes, is in "square conflict" with the decision of the First Circuit in this case that § 11341(a) of the Interstate Commerce Act preempts the unions' attempt to ob-

tain a Railway Labor Act "status quo" injunction against ICC-approved leases of rail line to the Springfield Terminal Railroad by the other Guilford railroads—even though the unions have never contended that Springfield Terminal and the other railroads are "alter egos" and the questions presented in the petition for certiorari do not concern the "alter ego" doctrine that the Seventh Circuit relied upon. (Petition for Certiorari ["Pet."] at i-ii). The unions fail to acknowledge the precise holding of *Burlington Northern*, which we submit is not in conflict with the decision below and does not even address the questions presented here.

Burlington Northern involves a Railway Labor Act challenge to the Burlington Northern's avowed attempt to escape from its collective bargaining agreements by transferring certain operations to an affiliated carrier, the Winona Bridge Company, through an ICC-approved grant of trackage rights. While the Seventh Circuit sustained the unions' challenge, the court noted that its opinion did not "resolve" the Interstate Commerce Act preemption question. (Fourth Supp. Br. at App. 21a). The court found it "unnecessary to decide whether the RLA is superseded in part by the ICA," because it held "that Winona Bridge, as the alter ego of the Burlington, is bound by the existing collective bargaining agreements * * *," and thus that the lower court could fashion a remedy preserving those agreements without enjoining consummation of the transfer of trackage rights approved by the ICC. (*Id.* at 26a). Enforcement of the Railway Labor Act in that manner would not, in the Seventh Circuit's view, run afoul of § 11341(a), which exempts a carrier from obligations under other laws only "as necessary to let [the carrier] carry out the transaction * * * ." (*Id.* at 25a). Nor, for the same reason, would such an order constitute an impermissible colla-

teral attack on the ICC's order approving the transfer of trackage rights. (*Id.* at 28a).[1]

In this case, by contrast, the unions have never contended that Springfield Terminal is the "alter ego" of the other Guilford railroads,[2] and they have never argued that there is *any* basis upon which the lower courts could have prevented what the unions characterize as a change in working conditions as a result of the leases, *except* by enjoining the leases themselves. Instead, the unions explicitly sought an order "enjoining any further implementation of the leases and * * * requiring respondents to rescind the leases which they [have] previously implemented" (Pet. at 11; see also Complaint, Prayer ¶ 4), and thus the lower courts were obliged to decide whether the Interstate Commerce Act preempted the unions' Railway Labor Act claim.

In short, the Seventh Circuit did not decide the Interstate Commerce Act preemption questions presented here because it resolved the *Burlington Northern* case on an independent alternative ground not applicable in this case. There is *no* conflict between the Seventh and First Circuits on the questions presented in this case.

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[1] The Seventh Circuit refused to follow the collateral attack holding in *Brotherhood of Loc. Engineers* v. *Boston & Maine Corp.*, 788 F.2d 794 (1st Cir. 1986), because it found "one crucial difference" between that case and *Burlington Northern*:

> "The parties to the [transaction] in *Boston & Maine* were in fact distinct entities whereas Burlington and Winona Bridge represent a singular interest. Consequently, the trackage rights agreement is not disturbed by requiring bargaining [before Winona departs from existing Burlington Northern agreements] after the ICC authorization." (Fourth Supp. Br. at App. 28a).

[2] Not all commonly-owned entitles are deemed alter egos for labor law purposes, of course. See, *e.g.*, *Alkire* v. *NLRB*, 716 F.2d 1014, 1021 & n.5 (4th Cir. 1983).

Respectfully submitted,

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